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In The

Supreme Court of the United States

October Term, 1996

NORTHEAST OHIO COALITION FOR THE HOMELESS, RICHARD CLEMENTS, FRUIT OF ISLAM OF MUHAMMAD'S MOSQUE NO. 18, AND STEVEN D. HILL,

Petitioners,

v.

CITY OF CLEVELAND,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

DAVID GOLDBERGER
ACLU Cooperating Attorney
The Ohio State University College of Law
Clinical Programs
55 West 12th Avenue
Columbus, Ohio 43210
(614) 292-6821

JOAN M. ENGLUND
Legal Director
American Civil Liberties Union of Ohio Foundation, Inc.
1266 W. 6th St., Suite 200
Cleveland, Ohio 44113-1353
(216) 781-8639

KEVIN FRANCIS O'NEILL
ACLU Cooperating Attorney
Assistant Professor of Law
Cleveland-Marshall College of Law
Cleveland State University
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-5282

Counsel of Record

RAYMOND VASVARI
ACLU Cooperating Attorney
1300 Bank One Center
600 Superior Avenue East
Cleveland, Ohio 44114-2650
(216) 522-1925

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, consistent with this Court's holding in *Murdock v. Pennsylvania*, a municipality may impose a flat, fifty-dollar-per-vendor license fee as a precondition to the sidewalk distribution of political and religious "street" newspapers?

2. Whether the First Amendment permits the imposition of a flat, fifty-dollar-per-vendor license fee as a precondition to the sidewalk distribution of political and religious "street" newspapers, even where it is undisputed that Petitioners are either homeless persons or indigent proselytizers for the Nation of Islam who cannot afford to pay the fee, and the licensing scheme that imposes the fee is bereft of an indigency exception?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, review of which is sought by this petition, is reported as *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107 (6th Cir. 1997) (hereinafter, "the Opinion"). It is reprinted in the appendix to this petition at page App. 1. The Opinion reversed a decision by the United States District Court for the Northern District of Ohio, which had granted Petitioners' request for injunctive relief. The District Court's opinion is reported at 885 F. Supp. 1029 (N.D. Ohio 1995); it is reprinted at App. 12.

The Sixth Circuit's unpublished order of April 10, 1997, denying Petitioners' request for rehearing and suggestion for rehearing en banc, is reprinted at App. 25.

JURISDICTION

The Sixth Circuit's Opinion was issued on February 3, 1997. *See* App. 1. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which the Sixth Circuit denied on April 10, 1997. *See* App. 25. This Court has jurisdiction under 28 U.S.C. section 1254(1).

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE ORDINANCE AT ISSUE

The provisions of Chapter 675 of the Codified Ordinances of Cleveland, Ohio are reprinted in the appendix to this petition, commencing at App. 26. Among those provisions, section 675.02(c)(3) is the specific target of this First Amendment challenge. It imposes "an annual license fee of fifty dollars" (App. 29), which must be paid by all who engage in "peddling" (App. 28). "Peddling" is defined as:

> selling, bartering, or offering or exposing for sale or barter any goods, wares, merchandise,

> menial tasks, such as painting numbers on curbs, food or beverages from, in, upon, along, or through the highways, streets, or sidewalks of the City, or in the open air or from a temporary shelter or vending device upon private property in the City.

Codified Ordinances of Cleveland, Ohio, section 675.01(a)(2) (App. 26-27).

STATEMENT OF THE CASE

This is a case about the power of municipalities to erect steep cost barriers to the sidewalk distribution of political and religious "street"[1] newspapers. Petitioners

[1] The sidewalk sale of "street" newspapers is a growing phenomenon in American cities. *See* Larry Dum, *Papers for Homeless Offer Needy a Leg Up*, N.Y. Times, March 31, 1997, at D7. There are now more than 70 such newspapers in communities of all sizes nationwide. *Id.* Most of them have an editorial focus on homelessness – and are sold by the homeless as a means of maintaining their individual sustenance. *See* Hillary Chura, *Homeless Newspapers Help Two Ways: Publications Inform Street People and Also Employ Them to Sell the Newspapers*, Austin American-Statesman, Sept. 28, 1996, at D2; Jon Anderson, *Homeless Press Grows with Need; Publications' Base Expands with Poor*, Chicago Tribune, Aug. 19, 1996, at B1; Don Jacobson, *Street Newspapers Band Together*, United Press International, Aug. 18, 1996; James L. Tyson, *Self-Sufficiency is Measure of Chicago Newspaper's Success*, Christian Science Monitor, April 11, 1996, at A3; Tim Jones, *Reader Guilt, Vendor Talent Propel Paper; Streetwise Becomes Nation's Largest Street Publication Aiding Homeless*, Chicago Tribune, Oct. 2, 1995, at C1; Chad Rubel, *Papers Sold by*

Northeast Ohio Coalition for the Homeless ("NEOCH"), Richard Clements, Fruit of Islam of Muhammad's Mosque No. 18 ("Fruit of Islam"), and Steven D. Hill seek Supreme Court review of the Opinion below because it leaves street newspapers vulnerable to regulatory eradication.

The material facts are undisputed.[2]

NEOCH is a non-profit advocacy group for the homeless. It publishes a newspaper known as *The Homeless Grapevine*, which is distributed exclusively by homeless and destitute people. NEOCH's purpose in publishing the *Grapevine* is twofold: to publicize the plight of the homeless, and to provide homeless persons with a vehicle for maintaining their individual sustenance. Those who distribute the *Grapevine* obtain copies from NEOCH for ten cents apiece. They distribute the newspaper on public sidewalks, offering it to passers-by

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Homeless Reach for Wider Audience, Marketing News, Sept. 25, 1995, at 12.

The Final Call, a newspaper that disseminates the religious and political views of Minister Louis Farrakhan and the Nation of Islam, is likewise sold on public sidewalks in major cities nationwide. Paul Shepard, *Final Call Sales Force Driving Legal Debate; Police May Ticket the Nation's News Vendors, but Islam Leaders Say They'll Stay on the Streets*, (Cleveland) Plain Dealer, Dec. 25, 1995, at B1.

[2] All record references are to the District Court's opinion. The following factual account is drawn directly from that opinion, and was described by the district judge as containing "[t]he undisputed and material facts." 885 F. Supp. at 1030 (App. at 13).

for a suggested donation of one dollar each. The distributors retain all proceeds received in this fashion. 885 F. Supp. at 1030 (App. at 13).

Fruit of Islam is a non-profit membership organization affiliated with the Nation of Islam. Its members disseminate the Nation of Islam's political and religious message by selling a newspaper known as *The Final Call*. Copies are sold on public sidewalks for one dollar apiece. Fruit of Islam members retain only thirty cents per copy; they remit the remainder to their mosque. Since they must also donate fifty dollars per month to the mosque, Fruit of Islam members earn only a subsistence living by distributing the paper. 885 F. Supp. at 1030 (App. at 13-14).

Respondent City of Cleveland ("the City") requires all "peddlers" to secure a permit, obtainable only through advance payment of a fifty-dollar fee.[3] *Grapevine* and *Final Call* distributors are financially unable to pay this fee, and NEOCH cannot afford to procure licenses for its distributors.[4] If the City persists in enforcing the challenged ordinance, NEOCH will be unable to distribute its newspaper in Cleveland. 885 F. Supp. at 1030-31 (App. at 14).

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[3] Codified Ordinances of Cleveland, section 675.02(c)(3), App. at 29.

[4] As the District Court observed: "Cleveland does not dispute that the Coalition's and the Mosque's individual distributors are unable to afford the license fee, nor does the city dispute that the Coalition cannot afford to procure a license on behalf of all its distributors." 885 F. Supp. at 1034 (App. at 22).

Richard Clements and Steven Hill – *Grapevine* and *Final Call* distributors, respectively – have each been arrested at least once for "peddling" their newspapers without the required license. Mr. Hill, in fact, has been prosecuted several times for violating the challenged ordinance. 885 F. Supp. at 1031 (App. at 14).

To identify the "administrative costs" associated with its licensing system, the City offered only one piece of evidence – an expense list that accounts for only forty-three of the fifty dollars it collects per permit:

Application Process:	$ 7.64
Supervisory Costs:	$26.74
License Issuance:	$ 2.25
Miscellaneous Paper Costs:	$ .28
Annual Field Maintenance:	$ 6.09
TOTAL:	$43.00

The City offered no further explanation of the costs associated with its licensing system. 885 F. Supp. at 1031 (App. at 14).

On May 3, 1995, the U.S. District Court for the Northern District of Ohio granted Petitioners' request for injunctive relief. It held that the City, by enforcing its license fee against *Grapevine* and *Final Call* distributors, was in violation of the First Amendment. App. at 12. On February 3, 1997, the U.S. Court of Appeals for the Sixth Circuit reversed. App. at 1. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which the Sixth Circuit denied on April 10, 1997. App. at 25.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

By upholding the imposition of a flat, fifty-dollar-per-vendor license fee as a precondition to the sidewalk distribution of political and religious "street" newspapers, the Sixth Circuit has flouted 54 years of First Amendment precedent – including this Court's controlling decisions in *Murdock v. Pennsylvania*[5] and *Follett v. Town of McCormick*.[6] Time and time again in American history, municipalities have employed such license fees to discourage sidewalk sales of newspapers, books, and pamphlets by a veritable Who's Who of unpopular groups: Jehovah's Witnesses,[7] Black Panthers,[8] anti-war

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[5] 319 U.S. 105 (1943) (rejecting – under the First Amendment – the application of a peddler's license fee to sidewalk and house-to-house sales of religious literature by Jehovah's Witnesses).

[6] 321 U.S. 573 (1944) (rejecting – under the First Amendment – the application of a peddler's license fee to sidewalk and house-to-house sales of religious literature by Jehovah's Witnesses).

[7] *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (*see supra* footnote 5); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (*see supra* footnote 6); *Zimmerman v. Village of London*, 38 F. Supp. 582 (S.D. Ohio 1941) (rejecting – under the First Amendment – the application of a license fee to door-to-door sales of religious literature by Jehovah's Witnesses).

[8] *Hull v. Petrillo*, 439 F.2d 1184, 1185-86 (2d Cir. 1971) (recognizing that city could not constitutionally apply its peddler's license fee to sidewalk sales of the Black Panther Party's newspaper – to do so would offend the First Amendment).

activists,[9] Socialists,[10] and Christian Fundamentalists.[11] Time and time again over the past six decades, courts have declared these enforcement efforts unconstitutional.[12]

This case is no different than the foregoing disputes; only the unpopular groups have changed. Targeted for suppression here are the twin pariahs of the Nineties: the homeless and the Nation of Islam. Their fate should have been no different than that of their predecessors. But the Sixth Circuit flouted *Murdock*'s mandate. Its Opinion is literally unprecedented: Neither the Sixth Circuit nor the City has managed to cite a single case upholding the application of a peddler's license fee as a precondition to the sidewalk distribution of printed matter.

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[9] *Gall v. Lawler*, 322 F. Supp. 1223 (E.D. Wis. 1971) (rejecting – under the First Amendment – the application of a peddler's license fee to sidewalk sales of an "underground" newspaper).

[10] *City of Bowling Green v. Lodico*, 11 Ohio St. 2d 135, 228 N.E.2d 325 (1967) (rejecting – under both the First Amendment and Article I, section 11 of the Ohio Constitution – the application of a peddler's license fee to sidewalk sales of *Young Socialist* magazine, because city official possessed unfettered discretion in issuing the license and because imposition of the fee constituted an impermissible prior restraint).

[11] *City of Cincinnati v. Mosier*, 61 Ohio App. 81, 22 N.E.2d 418 (1939) (rejecting – under both the First Amendment and Article I, section 11 of the Ohio Constitution – the application of a peddler's license fee to sidewalk sales of religious literature). *Accord*: *Holy Spirit Association for the Unification of World Christianity v. Hodge*, 582 F. Supp. 592 (N.D. Tex. 1984) (invoking the First Amendment to strike down, on its face, an ordinance requiring a fee before one could engage in a charitable solicitation campaign).

[12] *See supra* footnotes 5-11.

To reach the desired result, they rely instead on strands of precedent that feature very different facts and far more lenient levels of First Amendment scrutiny: cases upholding the regulation of parades[13] and charitable solicitations.[14] By invoking these alien precedents as if they were no less applicable than *Murdock*, the Opinion imports a new and far more deferential standard for gauging precisely the type of license fee that *Murdock* itself condemned:

> The lesson to be gleaned from *Cox* and *Murdock* is that an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest.

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[13] *See* App. at 6-8 (relying on *Cox v. New Hampshire*, 312 U.S. 569 (1941)); App. at 9-10 (relying on *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 275 (1991)). We will demonstrate that parade cases are entirely inapplicable to this dispute; *see infra* footnotes 20-24 and accompanying text.

[14] *See* App. at 8-9 (relying on *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1421 (1996)). The "compelling governmental interest in preventing fraudulent solicitations," 105 F.3d at 1110 (App. 8), has no place in the context of street newspapers. In exchange for one dollar, those who purchase *The Homeless Grapevine* and *The Final Call* get what they pay for: publications with distinctive editorial voices. To the extent that government may insinuate itself into these transactions in the name of rooting out "fraud," it may just as likely be on an undeclared mission to stamp out dissent.

App. at 7-8. In one fell swoop, the Opinion blurs *Cox* and *Murdock*, setting aside *Murdock*'s prohibition against flat fees imposed as a precondition to sidewalk expression and replacing it with *Cox*'s far more lenient test for parade permits. Thus, even while paying lip service to *Murdock*, the Opinion consigns it to oblivion. And it does so while studiously avoiding the salient question of the fee's *affordability* – on a record in which even the City concedes that Petitioners cannot afford to pay its fifty-dollar-per-vendor assessment.

There are four independently sufficient grounds for granting this request for a writ of certiorari:

I. The Opinion contradicts controlling Supreme Court authority – and, if left undisturbed, will cast grave doubt on *Murdock*'s continued vitality.

II. The Opinion creates an irreconcilable conflict in the circuits.

III. The Opinion erects unprecedented barriers to sidewalk speech by upholding the instant fee on a record in which it is undisputed that Petitioners cannot afford to pay the fee, and the licensing scheme that imposes the fee is bereft of an indigency exception.

IV. Across this country, more than seventy cities have "street" newspapers like those at issue here. By paving the way for their eradication, the Opinion has prompted a free speech conflict of national dimensions.

We will address each of these four grounds in turn.

I. By Holding that Municipalities May Impose a Flat, Fifty-Dollar-Per-Vendor License Fee as a Precondition to the Sidewalk Distribution of Political and Religious "Street" Newspapers, the Opinion Flouts Fifty Years of First Amendment Precedent – Including this Court's Controlling Decision in *Murdock v. Pennsylvania*.

Starting with this Court's seminal decision in *Murdock v. Pennsylvania*,[15] American courts have consistently held that a city cannot impose a flat license fee as a precondition to exercising the First Amendment right to disseminate ideas on public sidewalks.[16] The Opinion upholds precisely the type of fee that *Murdock* condemned (a *flat* license fee), in precisely the same context (as a *precondition* to expression), barring precisely the same medium (the printed word) in precisely the same forum (a public sidewalk). It is objectionable enough that the Opinion ignores *Murdock*; but the Opinion also ignores the fact that this Court recently reaffirmed the very aspect of *Murdock* on which Petitioners rely.[17]

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[15] 319 U.S. 105 (1943) (rejecting – under the First Amendment – the application of a peddler's license fee to sidewalk and house-to-house sales of religious literature by Jehovah's Witnesses). *Accord*: *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (rejecting – under the First Amendment – the application of a peddler's license fee to sidewalk and house-to-house sales of religious literature by Jehovah's Witnesses).

[16] *See supra* footnotes 5-11.

[17] *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378, 387 (1990) (observing that the constitutional flaw in the *Murdock* and *Follett* ordinances was that, by imposing a flat license tax "as a *precondition*" to the exercise of First Amendment freedoms, "they operated as prior restraints") (emphasis in original).

What *Murdock* condemned, what this Court still condemns,[18] and what the Opinion inexplicably upholds is choking off sidewalk expression *in advance* by making its exercise *preconditioned* on the payment of a flat license fee. *See Murdock*, 319 U.S. at 112 (condemning the imposition of "a flat license tax, the payment of which is a *condition* of the exercise of these constitutional privileges") (emphasis added). *Accord*: *Follett*, 321 U.S. at 577 ("The exaction of a tax as a *condition* to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint.") (citations omitted; emphasis added). Such a regulatory scheme restrains First Amendment freedoms in advance and "inevitably tends to suppress their exercise." *Murdock*, 319 U.S. at 114. It therefore offends one of the core purposes of the First Amendment:

> The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press . . . as the "taxes on knowledge" at which the First Amendment was partly aimed.

Id. at 114-15.

Since there is no meaningful difference between the licensing scheme in *Murdock* and the one at issue here, and since both schemes share a constitutional flaw that is still recognized by this Court, the Opinion's failure to follow *Murdock* is insupportable. Accordingly, this Court

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[18] *See supra* footnote 17.

should either grant review of the Opinion or summarily reverse it.[19]

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[19] Whether or not the instant newspapers are "sold" to passers-by is irrelevant for First Amendment purposes. The fact that a publication is *sold* rather than given away does not diminish its First Amendment protection. *Murdock*, 319 U.S. at 111; *City of Bowling Green v. Lodico*, 11 Ohio St. 2d 135, 138, 140, 228 N.E.2d 325 (1967); *Gall v. Lawler*, 322 F. Supp. 1223, 1225 (E.D. Wis. 1971). "It should be remembered," observed this Court, "that the pamphlets of Thomas Paine were not distributed free of charge." *Murdock*, 319 U.S. at 111.

Nor is the constitutionality of the ordinance saved by the fact that it regulates hot dog vendors and newspaper distributors alike. *Murdock*, 319 U.S. at 115; *Gall*, 322 F. Supp. at 1225. In striking down the application of a peddler's license fee to sidewalk sales of an "underground" newspaper, the *Gall* court observed:

> Insofar as the ordinance applies to First Amendment rights, it is fatally overbroad. The licensing provision of the ordinance, which might properly apply to a transient vacuum cleaner salesman, becomes constitutionally offensive when it is applied to the distribution of ideas.

322 F. Supp. at 1225. *Accord*: *Murdock*, 319 U.S. at 115 ("A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

A. In rejecting *Murdock*, the Opinion relies heavily on a line of cases that *Murdock* itself distinguished.

Consigning *Murdock* to oblivion, the Opinion relies instead on parade cases[20] – even though *Murdock* itself distinguished parades from sidewalk expression,[21] and even though the same distinction is made by the very parade cases that appear in the Opinion.[22] Indeed, both of the Opinion's parade cases turn in part on the recognition that disappointed parade applicants may always avail themselves of the *sidewalk*.[23] Thus, the Opinion uses parade cases to justify heightened barriers to sidewalk speech, even though those very precedents assume that public sidewalks will remain freely accessible to prospective speakers.[24]

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[20] *See* 105 F.3d at 1109-10 (App. at 6-10) (citing *Cox v. New Hampshire*, 312 U.S. 569 (1941) and *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991)).

[21] *Murdock*, 319 U.S. at 116 (distinguishing *Cox v. New Hampshire*, 312 U.S. 569 (1941)).

[22] *Cox*, 312 U.S. at 575 (observing that prospective speakers were free to use the sidewalk rather than marching in formation); *id.* at 576 (statute was designed to prevent congestion of public *streets*); *Stonewall Union*, 931 F.2d at 1137 (distinguishing streets from sidewalks as fora for speech) (in justifying heightened fees for use of streets, the Sixth Circuit here stresses that sidewalks are free and readily available to prospective speakers).

[23] *See supra* footnote 22.

[24] *See, e.g., Stonewall Union*, 931 F.2d at 1137 ("[I]n the present case, an alternative forum is available – the Columbus sidewalks which parallel the streets are *free* for purposes of conducting a parade. . . . ") (emphasis added); *id.* (describing

B. Left undisturbed, the Opinion will cast grave doubt on *Murdock*'s continued vitality.

If the Opinion stands, what is left of *Murdock*? To what set of facts does it apply, if not to ours? Does it serve now only to protect Jehovah's Witnesses? In rural Pennsylvania?

This case involves – as did *Murdock* – the application of a peddler's licensing scheme to sidewalk expression, imposed in the form of a flat fee, and exacted as a precondition to the sidewalk distribution of printed matter. Any factual *dissimilarity* between these cases is, from a First Amendment perspective, utterly trivial. Thus, the Sixth Circuit's refusal to treat *Murdock* as directly controlling is an affront to *Murdock*'s continued vitality. To dispel the impression that *Murdock* is effectively overruled, this Court should grant the instant petition.

II. The Opinion Creates an Irreconcilable Conflict in the Circuits.

The Opinion's holding stands in sharp contrast to the Second Circuit's decision in *Hull v. Petrillo*, 439 F.2d 1184, 1185-86 (2d Cir. 1971) – thereby creating a conflict in the federal circuits that justifies Supreme Court review.

In *Hull*, the Second Circuit was confronted with a First Amendment controversy effectively identical to the instant case. At issue was the power of a municipality to impose a flat, fifteen-dollar-per-vendor peddler's license

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sidewalks and parks as "a constitutionally acceptable alternative for indigent paraders").

fee as a precondition to the sidewalk sale of the Black Panther Party's newspaper. 439 F.2d at 1185. Properly invoking *Murdock*, the Second Circuit concluded that the city could not constitutionally apply its peddler's license fee to sidewalk sales of the Black Panther publication – to do so would offend the First Amendment. *Id.* at 1185-86.[25] In diametrical opposition to the Sixth Circuit's Opinion, the Second Circuit observed:

> [A]ny fee imposed as a *prerequisite* to the exercise of the right to communicate ideas on the public sidewalks is an unconstitutional prior restraint upon the freedom of expression.

Id. at 1186 (emphasis added). The foregoing quote is entirely consistent with this Court's recent reaffirmation of *Murdock* and *Follett* in *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378, 387 (1990) (observing that the constitutional flaw in the *Murdock* and *Follett* ordinances was that, by imposing a flat license tax "as a *precondition*" to the exercise of First Amendment freedoms, "they operated as prior restraints") (emphasis in original).

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[25] *Accord*: *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (striking down, under the First Amendment, the enforcement of a municipal regulation prohibiting visual artists from selling their works in public places without a general vendors license) (by imposing a numerical cap on the availability of such licenses, leaving a long list of individuals who were thus effectively barred from engaging in sidewalk expression, the regulation did not meet the First Amendment's "narrowly tailored" requirement, nor did it leave open ample alternative channels of communication), *cert. denied*, 65 U.S.L.W. 3798 (U.S. 1997).

Since the Opinion creates an irreconcilable conflict between the Sixth and Second Circuits on an important First Amendment question, this Court should grant Petitioners' request for a writ of certiorari.

III. The Opinion Erects Unprecedented Barriers to Sidewalk Speech by Upholding the Instant Fee in the Face of these Undisputed Facts: Petitioners Are Either Homeless Persons or Indigent Proselytizers for the Nation of Islam Who Cannot Afford to Pay the Fee, and the Licensing Scheme that Imposes the Fee is Bereft of an Indigency Exception.

The Opinion treats the challenged fee as a legitimate time, place, or manner regulation – even though it is really a forum-access *admission price*, one that makes the exercise of First Amendment freedoms contingent on one's ability to *pay*. Here, the Opinion willfully ignores the most important fact in the case (an *undisputed* fact, at that): namely, that Petitioners *cannot afford* the flat fee imposed by the City.[26] By leaving this critical fact out of its analysis, and by ignoring the whole question of affordability, the Opinion gives local government carte blanche to raise forum-access fees. In the analysis employed by the Opinion, the upward growth of such fees is limited only by the administrative cost estimates that are offered to support them. The Opinion even indulges a vague

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[26] 885 F. Supp. at 1030-31 (App. at 14); *id.* at 1034 (App. at 22). *See supra* footnote 4 and accompanying text.

reference to inflation as supporting an otherwise inexplicable gap between the City's estimate and its fee.[27]

Speech regulations that impose steep barriers of affordability have been constitutionally suspect for more than fifty years. As this Court observed in *Murdock*, the state may not impose a charge for the enjoyment of a right granted by the Constitution;[28] nor may it render the exercise of a constitutional right contingent on one's ability to pay.[29] As the Second Circuit observed in *Hull v. Petrillo*:

> The ability to pay is not a legitimate criterion for the state to employ in determining who is to express his views on its streets and who is not.[30]

This is especially critical when the issue is access to the *sidewalk* – the last bastion of free expression for impoverished speakers. In upholding a fifty-dollar fee for access to the sidewalk, the Sixth Circuit cites its own decision in *Stonewall Union v. City of Columbus*, 931 F.2d

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[27] *See* the District Court's opinion, 885 F. Supp. at 1031 (App. at 14), where the judge notes that the City's administrative costs are substantially less – in fact, 14% less – than the fee it actually imposes. Though the City explains this disparity as inevitably justified by rising costs, it would be odd indeed if an otherwise unconstitutional permit fee could be redeemed by the happenstance of inflation.

[28] *Murdock*, 319 U.S. at 113.

[29] *Id.* at 111.

[30] 439 F.2d 1184, 1186 (2d Cir. 1971).

1130 (6th Cir. 1991).[31] But *Stonewall Union*, in rejecting an affordability requirement for *parade* fees, specifically cited public *sidewalks* as an alternative forum for indigent speakers. *Id.* at 1137. Thus, the Opinion contradicts the very Sixth Circuit decision on which it places the greatest reliance.

The Opinion is especially offensive to free speech principles because, in upholding steep cost barriers to sidewalk expression, it does so on a record in which the City *concedes* that Petitioners cannot pay the required fee.[32] By subjecting *these particular newspapers* to the City's license fee, the Opinion paves the way for their demise. This is because the *Grapevine* is distributed exclusively by homeless and destitute individuals;[33] when directed at *them*, the fifty-dollar fee might just as well be a flat prohibition against distributing the newspaper at all. Likewise, *The Final Call* is distributed exclusively by young Fruit of Islam members who, just like the

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[31] *See* 105 F.3d at 1110 (App. at 9-10).

[32] As the District Court observed: "Cleveland does not dispute that the Coalition's and the Mosque's individual distributors are unable to afford the license fee, nor does the city dispute that the Coalition cannot afford to procure a license on behalf of all its distributors." 885 F. Supp. at 1034 (App. at 22).

[33] 885 F. Supp. at 1030 (App. at 13).

Jehovah's Witnesses in *Murdock*,[34] keep only a fraction of their sales proceeds, turn over most of their money to the Mosque, and therefore maintain only a subsistence living.[35] Since a peddler's license is beyond the reach of the very people who distribute these newspapers, their circulation is gravely threatened by the enforcement of this licensing scheme.

From a First Amendment perspective, thwarting a paper's distribution is no different than halting its publication:

> [An] ordinance cannot be saved because it relates to distribution and not to publication. Liberty of circulating is as essential to [First Amendment] freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.

Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

To survive First Amendment scrutiny, a licensing scheme of the sort imposed here must at least contain an

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[34] 319 U.S. at 107 n.2 & 109 n.7 (noting that "colporteurs" of the Jehovah's Witness faith must purchase the books and pamphlets they sell, may retain only half of their sales proceeds, and must pay all of their traveling and living expenses with the funds they are permitted to retain).

[35] 885 F. Supp. at 1030 (App. at 13-14).

exception for indigent speakers;[36] but the ordinance here is bereft of an indigency exception.[37]

By ignoring the foregoing authorities, and by ignoring the record before it, the Sixth Circuit has erected unprecedented barriers of cost to sidewalk expression. Accordingly, its Opinion should be subjected to Supreme Court review.[38]

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[36] *Invisible Empire Knights of the Ku Klux Klan v. City of West Haven*, 600 F. Supp. 1427, 1435 (D. Conn. 1985) (successful First Amendment challenge by KKK to an ordinance that required prospective speakers to purchase a permit for use of a public park – the permit scheme's invalidity stemmed in part from the lack of an indigency exception for impoverished speakers) ("Even if the city were allowed to impose costs of police protection on permit applicants, section 5L makes no provision for applicants who, by reason of indigency, cannot provide the necessary financial security. It has been well established in recent years that the exercise of fundamental constitutional rights cannot be conditioned upon an individual's wealth. To the extent that section 5L requires payment of a bond for costs to those who can demonstrate their inability to obtain such a bond, it is declared unconstitutional.") (citations omitted). *Accord*: *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523-24 (11th Cir. 1985) (striking down ordinance that required persons wishing to demonstrate in city streets and parks to prepay amount of costs for police protection – in part because it denied indigent persons who wished to exercise their First Amendment rights of speech and assembly, but who were unable to pay such costs, an equal opportunity to be heard, and the ordinance contained no indigency exception).

[37] *See* Codified Ordinances of Cleveland, sections 675.02, 675.04, 675.99 (App. at 28, 30, 43).

[38] The instant fee is constitutionally vulnerable on yet another ground: As the District Court correctly held below (App. at 19-20), the fifty-dollar license fee is not even reasonably related to the cost of defraying legitimate government expenses,

IV. Across this Country, More than Seventy Cities Have "Street" Newspapers Like Those at Issue Here. By Paving the Way for Their Eradication, the Opinion has Prompted a Free Speech Conflict of National Dimensions.

The Opinion represents a special threat to "street" newspapers – publications that are sold on sidewalks nationwide by the homeless[39] and the Nation of

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because the fee serves almost exclusively to defray nothing more than the cost of its own collection. Referring to the City's own cost breakdown (App. at 14), only a small portion of the fifty-dollar license fee – the $6.09 spent on "Annual Field Maintenance" – seems to be linked in any way to the regulation of the secondary effects of expression. The bulk of the costs involved – for the application process ($7.64), unspecified "Supervisory Costs" ($26.74), and license issuance ($2.25) – seem related only to the cost of issuing the license itself. And despite the fact that the fee totals fifty dollars, Cleveland can at best account for only forty-three dollars of its use (App. at 14), asserting in passing that the disparity between what is collected and what is spent by now must have closed with rising costs. Respondent's Sixth Circuit Brief at 5. It would be odd indeed if an otherwise unconstitutional permit fee could be redeemed by the happenstance of inflation. But it should take more than inflation to save Cleveland's fee. Even assessed in the most charitable light, as a restriction reasonably related to the administrative cost of policing the harm it seeks to regulate, the permit fee in question is – even by the City's own reckoning – larger than the sum of the nebulous costs it is alleged to cover, and the vast majority of the money collected is in no way directed to "the problems with which the police power of the state is free to deal." *Murdock*, 319 U.S. at 116. Accordingly, the District Court correctly held the fee to be unrelated to any legitimate purpose, and justified solely as a means of supporting the mechanism of its own collection.

[39] *See supra* footnote 1.

Islam.[40] Indeed, more than seventy[41] American cities have street newspapers like those at issue here. If the Opinion is left undisturbed by this Court, municipalities across the country will be armed with a potent new weapon for eradicating such newspapers. Since they are distributed solely on public sidewalks and solely by indigent people, street newspapers are particularly vulnerable to the sort of pre-distribution license fee that the Opinion upholds – especially because, in the Opinion's wake, such fees may be imposed regardless of their affordability.[42]

Given the broad proliferation of street newspapers and the regulatory choke-hold to which the Opinion subjects them, this case presents a First Amendment controversy of national dimensions. Accordingly, this Court should grant Petitioners' request for a writ of certiorari.

CONCLUSION

A municipality may not impose a flat, fifty-dollar-per-vendor license fee as a precondition to the sidewalk

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[40] *The Final Call*, which disseminates the religious and political views of Minister Louis Farrakhan and the Nation of Islam, is sold on public sidewalks in major cities nationwide. Paul Shepard, *Final Call Sales Force Driving Legal Debate; Police May Ticket the Nation's News Vendors, but Islam Leaders Say They'll Stay on the Streets*, (Cleveland) Plain Dealer, Dec. 25, 1995, at B1.

[41] Larry Dum, *Papers for Homeless Offer Needy a Leg Up*, N.Y. Times, March 31, 1997, at D7 ("[T]here are now more than 70 newspapers for the homeless in communities of all sizes nationwide . . . ").

[42] *See supra* section III of this petition.

distribution of political and religious "street" newspapers. By holding otherwise, the Sixth Circuit has simply refused to follow this Court's controlling decision in *Murdock v. Pennsylvania*. Its Opinion is all the more offensive to the First Amendment – and all the more threatening to "street" newspapers generally – because the Sixth Circuit upheld the fee on a record that contains these undisputed facts: The newspapers here are distributed either by homeless persons or indigent proselytizers for the Nation of Islam who cannot afford to pay the fee, and the licensing scheme that imposes the fee is bereft of an indigency exception.

Accordingly, Petitioners request that this Court either grant their petition for a writ of certiorari or summarily reverse the ruling below.

Respectfully submitted,

KEVIN FRANCIS O'NEILL
ACLU Cooperating Attorney
Assistant Professor of Law
Cleveland-Marshall College of Law
Cleveland State University
1801 Euclid Avenue
Cleveland, Ohio 44115
(216) 687-5282

Counsel of Record

RAYMOND VASVARI
ACLU Cooperating Attorney
1300 Bank One Center
600 Superior Avenue East
Cleveland, Ohio 44114-2650
(216) 522-1925

Attorneys for Petitioners

Of Counsel:

DAVID GOLDBERGER
ACLU Cooperating Attorney
The Ohio State University
College of Law
Clinical Programs
55 West 12th Avenue
Columbus, Ohio 43210
(614) 292-6821

JOAN M. ENGLUND
Legal Director
American Civil Liberties Union of Ohio Foundation, Inc.
1266 W. 6th St., Suite 200
Cleveland, Ohio 44113-1353
(216) 781-8639

NORTHEAST OHIO COALITION FOR THE HOMELESS, et al., Plaintiffs-Appellees,

v.

CITY OF CLEVELAND, Defendant-Appellant.

Nos. 95-3665, 95-4016
United States Court of Appeals,
Sixth Circuit.

Argued Sept. 23, 1996.
Decided Feb. 3, 1997.

Nonprofit organizations brought declaratory judgment action against city challenging constitutionality of city ordinance requiring payment of $50 license fee for all peddlers within city. The United States District Court for the Northern District of Ohio, Ann Aldrich, J., 885 F.Supp. 1029, enjoined enforcement of ordinance. City appealed. The Court of Appeals, Alan E. Norris, Circuit Judge, held that license fee imposed by city ordinance requiring street peddlers to register with city was not impermissible prior restraint of speech under First Amendment or Ohio Constitution.

Reversed and remanded.

Raymond V. Vasvari, Kevin F. O'Neill (argued and briefed), Cleveland-Marshall College of Law, Visiting Assistant Professor of Law, Cleveland, OH, for Plaintiffs-Appellees.

Charles E. Hannan, Jr. (argued and briefed), City of Cleveland Law Department, Office of Director of Law, Cleveland, OH, for Defendant-Appellant.

Before: NORRIS, SUHRHEINRICH, and BATCHELDER, Circuit Judges.

ALAN E. NORRIS, Circuit Judge.

In this consolidated appeal, defendant, the City of Cleveland, challenges the district court's order granting summary judgment to plaintiffs, the Northeast Ohio Coalition for the Homeless ("Coalition"), Richard Clements, Fruit of Islam of Muhammad's Mosque No. 18 ("Mosque"), and Steven D. Hill, and permanently enjoining the enforcement of a City of Cleveland ordinance requiring all peddlers to pay a license fee. The city also challenges the district court's subsequent order awarding attorney's fees to plaintiffs pursuant to 42 U.S.C. § 1988. For the following reasons, we reverse both of the district court's orders and remand with instructions to enter summary judgment in favor of the city.

I.

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983, he [sic] free speech provision of the Ohio Constitution, Ohio Const, art. I, § 11, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. They challenge the constitutionality of a Cleveland ordinance regulating peddling on public property. The material facts of the case are not in dispute. Cleveland Codified Ordinance § 675.02(a) requires that every person who engages in peddling anywhere in the city be in possession of a peddler's license.[1] Section 675.02(c)(3) states that each

[1] The ordinance defines "peddling" broadly to include

applicant for such a license must pay an annual fee of fifty dollars to cover the expenses incident to processing the application and supervising the licensee. In return for the fee, each applicant receives the license itself, containing his name and address, a detailed description of the goods he is authorized to sell, and a license number and expiration date, as well as a laminated identification card containing his photograph. *See* § 675.03(a)-(b). Section 675.03(a) states that the peddler must wear the identification card and carry the license on his person whenever he is engaged in peddling. In 1989, the cost to the city of administering the licensing program was forty-three dollars per license issued.

The Coalition is a nonprofit organization dedicated to addressing the needs of homeless citizens. To publicize the plight of the homeless and to provide homeless individuals with a means for soliciting charitable contributions, the Coalition publishes a periodic newspaper called *The Homeless Grapevine*. The *Grapevine* is distributed exclusively by homeless and destitute individuals who obtain copies of the paper from the Coalition for ten cents each and then offer them to passers-by on public sidewalks for a suggested donation of one dollar. The distributors may retain all of the donations they receive.

"selling, bartering, or offering or exposing for sale or barter any goods, wares, merchandise, menial tasks, such as painting numbers on curbs, food or beverages from, in, upon, along, or through the highways, streets, or sidewalks of the City, or in the open air or from a temporary shelter or vending device upon private property in the City." *See* § 675.01(a)(2).

The Mosque is a nonprofit membership organization affiliated with the Nation of Islam. Its members disseminate the Nation of Islam's religious and political beliefs by selling copies of a newspaper known as *The Final Call.* Members sell the newspapers on public sidewalks for one dollar per copy. Of the one dollar they collect for each copy of the paper, members retain thirty cents, remitting the remainder to the Mosque. In addition, members must donate fifty dollars a month to the Mosque. Plaintiffs Clements and Hill have been arrested in the past for distributing the *Grapevine* and *Final Call* without peddler's licenses.

On September 27, 1994, plaintiffs brought this action in the United States District Court for the Northern District of Ohio, challenging the license fee ordinance under both the United States and Ohio constitutions, and seeking declaratory and injunctive relief. Plaintiffs filed a motion for summary judgment, and the city filed a cross-motion for summary judgment. On May 3, 1995, the district court addressed the constitutionality of the § 675.02(c)(3) license fee requirement. Concluding that the city failed to adequately articulate a purpose for its peddlers' ordinance, the court characterized the license fee as a flat tax which serves only "to defray the expenses of the licensing provision itself." *Northeast Ohio Coalition for the Homeless v. City of Cleveland,* 885 F.Supp. 1029, 1033 (N.D.Ohio 1995). Relying upon *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), and *Follett v. Town of McCormick, S.C.,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944), the court concluded that the fee constituted an impermissible prior restraint on speech under both the United States and Ohio constitutions. 885

F.Supp. at 1034. Accordingly, the district court granted plaintiffs' motion for summary judgment, denying the city's cross-motion for summary judgment and permanently enjoining the enforcement of § 675.02(c)(3).

On August 18, 1995, the district court awarded plaintiffs attorney's fees in the amount of $15,628. The city filed timely appeals from both orders.

II.

The city contends that the fifty dollar license fee is a reasonable fee which serves to defray the expenses associated with administering an otherwise valid ordinance, and thus does not violate either the United States or Ohio constitutions. Since the facts of this case are not in dispute, we review the district court's grant of plaintiffs' motion for summary judgment and denial of the city's cross-motion for summary judgment de novo. *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.1988).

A. First Amendment

It is well-settled that solicitations to pay or contribute money to charity involve a variety of speech interests and are generally entitled to protection under the First Amendment. *See Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 788-89, 108 S.Ct. 2667, 2673-74, 101 L.Ed.2d 669 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 959-60, 104 S.Ct. 2839, 2848-49, 81 L.Ed.2d 786 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632, 100

S.Ct. 826, 833-34, 63 L.Ed.2d 73 (1980). It is equally clear that while the government may not tax the exercise of constitutionally protected activities, it may restrict the exercise of such activities by "reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' " *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983)). The Supreme Court's decisions in *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941), *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), and *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992), demonstrate these principles in the context of license fee requirements. In *Cox*, the Supreme Court considered the constitutionality of a state statute requiring marchers to obtain licenses and to prepay fees of no more than three hundred dollars a day before they could parade on public streets. In upholding the validity of the state statute, the Supreme Court held that the license fee did not offend the marchers' First Amendment rights because it was not a revenue tax, but rather a means to defray the expenses incident to the administration of the statute, and to the maintenance of public order during licensed parades. 312 U.S. at 577, 61 S.Ct. at 766. In reaching its conclusion, the Court noted that "[t]here is no evidence that the statute has been administered otherwise than in the fair and nondiscriminatory manner which the state court has construed it to require." *Id.*

In *Murdock*, decided two years after *Cox*, a religious group attacked the constitutionality of a city ordinance which required it to pay a flat license fee as a condition to conducting its distribution activities. The Supreme Court struck down the ordinance as unconstitutional because the license fee was essentially "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights." *Murdock*, 319 U.S. at 113, 63 S.Ct. at 875. In referring to the ordinance, the Court stated:

> [T]he issuance of the permit or license is dependent on the payment of a license tax. And the tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question.

Id. at 113-14, 63 S.Ct. at 875. The Supreme Court distinguished the state statute it upheld in *Cox*, stating that unlike the statute in *Cox*, the ordinance challenged in *Murdock* was not a "state regulation of the streets to protect and insure the safety, comfort, or convenience of the public," and the license fee "[was] not a nominal one, imposed as a regulatory measure and calculated to defray the expenses of protecting those on the streets and at home against the abuses of solicitors." *Id.* at 116, 63 S.Ct. at 876.

The lesson to be gleaned from *Cox* and *Murdock* is that an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to

defraying expenses incurred in furtherance of a legitimate state interest. In *Forsyth County*, 505 U.S. at 123, 112 S.Ct. at 2397-98, the Supreme Court appended an important limitation to a government's ability to recover such expenses. There, the Court found unconstitutional a city ordinance which required private groups to pay a license fee as a condition to engaging in demonstrations on public lands. The amount of the license fee was to be fixed by the county's Board of Commissioners "in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed," but the fee was not to exceed one thousand dollars per day. *Id.* at 126-27, 112 S.Ct. at 2399-2400. The Court concluded that the ordinance was not content-neutral because "[t]he fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content." *Id.* at 134, 112 S.Ct. at 2403.

In the present case, the district court held that the peddlers' licensing ordinance constitutes an impermissible prior restraint on speech because the fifty dollar license fee is not "tied to defraying the expenses of administering a valid regulatory scheme, [given that] the only regulation whose expenses it defrays is that requiring payment of the fee." 885 F.Supp. at 1034. We are unable to agree with the court's characterization of the purpose underlying the ordinance and the license fee. This court has previously referred to the "compelling governmental interest in preventing fraudulent solicitations of the very individuals most disposed to contribute financial support in response to pleas for donations." *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d

1474, 1482 (6th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1421, 134 L.Ed.2d 545 (1996). In addition, the city has an interest in giving its citizens some assurance that it can identify and pursue peddlers who do engage in fraudulent or unlawful conduct. This ordinance, by requiring street peddlers to register with the city and wear identification cards while they are engaged in peddling, furthers the aforementioned interests, and the administrative costs incident to the implementation of an ordinance embodying compelling governmental interests are defrayed by the fee.

Plaintiffs argue that a license fee which serves to defray the expenses of administrating an ordinance that encroaches on First Amendment rights is permissible only if the fee is nominal in amount. They rely upon *Murdock*, 319 U.S. at 116, 63 S.Ct. at 876, for this proposition. We have previously addressed this precise issue in *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir.1991). In that case, we upheld a Columbus ordinance that required applicants for parade permits to pay an eighty-five dollar fee. We specifically held that a more than nominal permit fee is constitutionally permissible so long as the fee is "reasonably related to the expenses incident to the administration of the ordinance and to the maintenance of public safety and order." *Id.* at 1136. In the present case, the parties do not dispute that in 1989, the city's cost of administering the peddlers' licensing ordinance was forty-three dollars per permit. Moreover, there is no evidence that the fees were charged for any reason other than to defray the costs of administering the ordinance. Thus, the fifty dollar fee is neither unreasonable, nor excessive.

Like the regulations upheld in *Cox* and *Stonewall*, Cleveland's peddlers' ordinance and the license fee it imposes are narrowly tailored to further a legitimate governmental interest. The fee is reasonably related to the costs of administering the ordinance, and the licensing program helps to prevent fraud by solicitors. In addition, the program enables the city to offer some protection to individuals who donate money to street peddlers. Moreover, unlike the fee in *Forsyth County*, the fifty dollar license fee in this case is content-neutral – all peddlers must pay it regardless of the source and nature of the products they peddle. Accordingly, the city's fee does not unduly or impermissibly burden plaintiffs' First Amendment rights.

Consequently, we hold that the license fee imposed by Cleveland's peddlers' ordinance is a constitutionally permissible time, place, and manner regulation of expressive conduct.

B. Ohio Constitution

Article I, § 11 of the Ohio Constitution provides in part: "no law shall be passed to restrain or abridge the liberty of speech, or of the press." In *Eastwood Mall, Inc., v. Slanco*, 68 Ohio St.3d 221, 222, 626 N.E.2d 59, 61 (1994), the Ohio Supreme Court reiterated that the protections afforded by this clause extend no further than those provided under the First Amendment to the United States Constitution. Since the license fee required by Cleveland's peddlers' ordinance does not constitute an impermissible prior restraint of speech under the First

Amendment to the United States Constitution, the ordinance does not run afoul of the Ohio Constitution.

Accordingly, the district court erred in granting plaintiffs' motion for summary judgment, and in permanently enjoining enforcement of the ordinance. Moreover, the district court erred in denying the city's cross-motion for summary judgment.

III.

The city further argues that the district court erred in awarding plaintiffs attorney's fees under 42 U.S.C. § 1988. In view of our disposition of this appeal, plaintiffs are not "prevailing parties" as contemplated by § 1988; they are therefore not entitled to attorney's fees.

IV.

For the reasons stated above, the district court's order granting summary judgment to plaintiffs, denying defendant's cross-motion for summary judgment, and permanently enjoining the enforcement of Cleveland Codified Ordinance § 675.02(c)(3) is reversed, and this case is remanded with instructions to enter summary judgment in favor of the city. Furthermore, the district court's order awarding plaintiffs attorney's fees under 42 U.S.C. § 1988 is reversed.

NORTHEAST OHIO COALITION FOR THE HOMELESS, et al., Plaintiffs,

v.

CITY OF CLEVELAND, Defendant.

No. 1:94CV2008,
United States District Court,
N.D. Ohio,
Eastern Division.

May 3, 1995.

Nonprofit organizations challenged constitutionality of city ordinance requiring payment of $50 license fee for all peddlers distributing literature in exchange for money. The District Court, Aldrich, J., held that imposition of a flat license tax on the dissemination of religious literature in public by solicitors who seek a donation in return for publication violates the First Amendment as a prior restraint on protected speech.

Motion for summary judgment granted.

Kevin F. O'Neill, American Civ. Liberties Union of Ohio Foundation, Raymond V. Vasvari, Cleveland, OH, for plaintiffs.

Sharon Sobol Jordon, Charles E. Hannan, Jr., City of Cleveland, Dept. of Law, Cleveland, OH, for defendant.

MEMORANDUM AND ORDER

ALDRICH, District Judge.

The Northeast Ohio Coalition for the Homeless (the "Coalition"), Richard Clements, Fruit of Islam of Muhammad's Mosque No. 18 (the "Mosque"), and Steven D. Hill

(collectively "plaintiffs") bring this action pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 2201(a), and the Ohio Constitution, against the City of Cleveland. The complaint challenges the constitutionality of Cleveland's Codified Ordinances § 675.02(c)(3). This Court has jurisdiction over the federal question, and supplemental jurisdiction over the state constitutional claim. Both sides have moved for summary judgment. For the reasons discussed below, the plaintiffs' motion for summary judgment is granted and the defendant's motion is denied.

I.

The undisputed and material facts follow.

The Coalition is a non-profit organization whose asserted purpose is to address the needs of homeless citizens. To this end, it publishes *The Homeless Grapevine* to publicize the plight of the homeless and to solicit charitable contributions for the sustenance of homeless individuals. The homeless and destitute people who distribute the paper acquire their copies from the Coalition for $.10 each. They then offer them to passers-by on public sidewalks, for a suggested donation of $1.00. The distributors retain all funds they receive in this fashion.

The Mosque is a non-profit membership organization. Its members propagate the Nation of Islam's religious and political paper, *The Final Call*. Distributors sell, on city sidewalks, copies of the paper for $1.00 each; they retain $.30 of this amount, and remit the remainder to the Mosque. Because members of the Mosque are expected to donate an additional $50.00 a month to the Mosque,

distributors earn only a subsistence living through distribution of the paper.

The City of Cleveland requires all "peddlers" to obtain a permit, which requires payment of a $50.00 fee in advance. The Coalition, most of its distributors, and most *Final Call* distributors are financially unable to pay this fee. In fact, the Coalition will be unable to distribute its publication in Cleveland if the city continues to enforce the challenged ordinance. Richard Clements and Steven Hill, distributors of *The Homeless Grapevine* and *The Final Call*, respectively, have been arrested at least once for disseminating their respective publications without the required license. Hill, in fact, has been prosecuted several times for violation of the city's ordinance.

In 1989, the administrative cost of Cleveland's peddler registration system was $43.00, apparently per permit issued. These costs were allocated as follows:

Application process:	$ 7.64
Supervisory costs:	$26.74
License issuance:	$ 2.25
Miscellaneous Paper Costs:	$ .28
Annual Field Maintenance:	$ 6.09
TOTAL:	$43.00

The City offers no further explanation of the costs associated with its licensing system.

II.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir.1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252, 106 S.Ct. at 2512.

III.

Cleveland Codified Ordinances § 675.01(a)(2) provides:

> "Peddling" means selling, bartering, or offering or exposing for sale or barter any goods, wares, merchandise, menial tasks, such as painting numbers on curbs, food or beverages from, in, upon, along, or through the highways, streets, or sidewalks of the City, or in the open air or from a temporary shelter or vending device upon private property in the City.

The term "peddler" includes a "solicitor." C.C.O. § 675.01(a)(3). Section 675.02(a) prohibits the practice of peddling without a license. Section 675.02(c)(3) requires every person seeking to obtain a license to pay a $50.00 annual fee. The plaintiffs here challenge the imposition of

this license under both the federal and Ohio constitutions. Each of these issues is addressed below.

A. Imposition of a flat license tax on the dissemination of religious literature in public by solicitors who seek a donation in return for the publication violates the first amendment as a prior restraint on protected speech. *Murdock v. Commonwealth of Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); and *Follett v. Town of McCormick, S.C.,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944). The charitable solicitation of funds in general is speech wholly within the scope of first amendment protection. *Village of Schaumburg v. Citizens For A Better Environment,* 444 U.S. 620, 632, 100 S.Ct. 826, 833, 63 L.Ed.2d 73 (1980). In reaching its conclusion, the *Murdock* court noted that "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock,* 319 U.S. at 112, 63 S.Ct. at 874. The Court distinguished a flat tax or license fee, imposed on the distribution of a publication, from "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question," and from a fee that is apportioned. *Id.,* at 113-114, 63 S.Ct. at 875.

A fee limited to the expense incident to the administration of a regulatory provision and to the "maintenance of public order in the matter licensed" does not offend the first amendment where the regulatory provision itself is constitutional. *Cox v. State of New Hampshire,* 312 U.S. 569, 577, 61 S.Ct. 762, 766, 85 L.Ed. 1049 (1941). In Cox, the Supreme Court upheld a $300 permit fee applied to requests for permission to conduct a parade or march. The Court made clear that its decision turned on the power of the state to regulate its highways against the

harms caused by spontaneous marches, and to defray the expense of that regulation. *Id.*, at 574-575, 61 S.Ct. at 765. The Court noted that the marchers were not charged for distributing leaflets, and expressly refused to consider whether their rights to disseminate written materials were implicated by the imposition of a fee for a parade permit. *Id.*, at 571-575, 61 S.Ct. at 764-765.

The Court recently considered its decisions in *Murdock* and *Follett* in the context of a generally applicable sales and use tax imposed on the distribution of religious materials by a religious organization. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990). The Court there upheld against first amendment challenge a sales tax when imposed on the receipts from sales of religious materials. The Court reconciled this decision with *Murdock* and *Follett* in holding that those decisions invalidated only flat licensing taxes that operated as prior restraints. *Id.*, at 389, 110 S.Ct. at 695. Because the tax at issue in *Jimmy Swaggart Ministries* was not imposed at the time of registration, it did not constitute a prior restraint. *Id.*, at 390-391, 110 S.Ct. at 696. In addition, the tax was apportioned, unlike that at issue in *Murdock* and *Follett*, because it was tied to the realized receipts from the sales of the material in question. *Id.*

Most of the subsequent federal cases addressing the imposition of fees as a prerequisite to permission to distribute leaflets in public have held that such fees are invalid under *Murdock* and *Follett*. *See, e.g., Holy Spirit Association for the Unification of World Christianity v. Hodge*, 582 F.Supp. 592 (N.D.Tx.1984) (permit fee applied to solicitations of charitable contribution and posting of

fidelity bond as prerequisite to registration of soliciting organization held unconstitutional); and *Gall v. Lawler,* 322 F.Supp. 1223 (E.D.Wisc.1971) (imposition of licensing fee on distribution of newspaper held invalid because, *inter alia,* it constitutes a prior restraint).

Cleveland points to several cases in which licensing fees were permitted in various contexts in support of the proposition that, so long as such fees are related to defraying the administrative expense associated with regulation, they are constitutionally permissible. Representative of these cases are *Jimmy Swaggart Ministries; Bright Lights Inc. v. City of Newport,* 830 F.Supp. 378 (E.D.Ky.1993); and *Center For Auto Safety, Inc. v. Athey,* 37 F.3d 139 (4th Cir.1994) None of these decisions is applicable to the facts before this Court.

As discussed above, *Jimmy Swaggart Ministries* approved a sales and use tax on the receipts from sales of religious literature. Unlike the fee imposed here and in *Murdock* and *Follett,* that tax did not constitute a prior restraint on expression and it was apportioned to the target's ability to pay. *Jimmy Swaggart Ministries* is simply inapposite here.

The court in *Bright Lights Inc.* upheld against first amendment challenge a tax imposed on bars at which nude dancing was performed. The court found that the license fee was incident to defraying the administrative costs of regulating the secondary effects of such establishments, such as the increase in prostitution and related crimes near the establishments in question.

This tax is clearly distinguishable from the license fee here. Here, Cleveland does not maintain that its fee is

directed to policing secondary effects of distribution of *The Homeless Grapevine* and *The Final Call*. Instead, Cleveland maintains that its fee is necessary to defray the expenses of the licensing provision itself. Cleveland's *Memorandum In Support of Motion For Summary Judgment*, at 5. This justification is wholly circular. That is, the challenged ordinance revolves around the mechanism requiring the collecting of a fee, and the city defends that mechanism as incident to defraying the costs of that same regulatory scheme. If this Court found the city's justification sufficient to survive first amendment scrutiny, *Murdock* and *Follett* would, in effect, be overruled. This is so because the *Murdock* and *Follett* decisions invalidated the process of imposing a flat fee in return for a license to disseminate material where that fee, *inter alia*, is a general revenue tax. Simply through the artifice of maintaining that the fee defrays the cost of collecting the fee, and is therefore not a general revenue tax but a fee necessary to defray the costs of regulation, the city would be permitted to circumvent the *Murdock* and *Follett* decisions. While the first amendment certainly countenances the imposition of nominal fees to defray the costs of permissible regulation of speech, it does not permit the avoidance of its command through the sort of bootstrapping Cleveland attempts here. Further distinguishing the *Bright Lights Inc.* case from that currently before this Court is the fact that the *Bright Lights Inc.* court did not address the prior restraint concerns that were central to the *Murdock* and *Follett* decisions.

The Fourth Circuit, in *Athey*, approved the imposition of a sliding-scale fee on organizations wishing to engage in charitable solicitation. *Athey*, 37 F.3d at 145. The size of

the fee was based on the level of the organization's charitable contributions. The purpose of this fee was to defray the costs of a regulatory scheme aimed at the prevention of fraud by charitable organizations. *Id.* This case is inapposite to the dispute here for two reasons. First, the fee at issue in *Athey* was apportioned through its sliding-scale mechanism. This apportionment was central to the court's holding that the fee satisfied the requirements of *Murdock* and *Follett* as understood by the *Jimmy Swaggart Ministries* court. Second, the regulatory scheme, the costs of which the fee was directed toward defraying, was directed at combating a specific regulatory problem – the prevention of fraud – while that at issue here is not.

Cleveland also points to a recent Second Circuit decision in support of its position. *See National Awareness Foundation v. Abrams,* 50 F.3d 1159 (2nd Cir.1995).[1] There, the court upheld imposition of a flat fee on charitable organizations that employed professional solicitors. However, the parties did not dispute the constitutionality of such a fee. *Id.*, at 1163-1164. Thus, the court did not address the question at issue here, but rather addressed the question whether such a fee, assuming its constitutionality, could be imposed not merely to defray administrative costs but also to defray the costs of enforcing the regulatory scheme pursuant to which the fee was imposed. In answering this question in the affirmative, the court did no more than reject the distinction between

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[1] The city actually points to the district court judgment the Second Circuit affirmed. At the time the briefs were filed in this case, the Second Circuit had not yet decided *Abrams*.

costs tied to the administration of a regulation and those tied to its enforcement. *Id.*, at 1165-1166. In any event, to the extent that the *Abrams* decision can be read to hold that the imposition of a fee to defray the costs merely of collecting the fee is constitutional, this Court rejects such a holding as contrary to *Murdock, Follett,* and *Jimmy Swaggart Ministries.*

Here, the ordinance in question imposes a $50 fee on all "peddlers" who seek to distribute literature in return for money. Cleveland does not dispute that the Coalition's and the Mosque's individual distributors are unable to afford the license fee, nor does the city dispute that the Coalition cannot afford to procure a license on behalf of all its distributors. In any event, the city does not challenge the plaintiffs' standing to attack the constitutionality of the ordinance on this ground even were all the plaintiffs able to afford the licensing fee.[2] Cleveland offers nothing to suggest that the fee defrays the expense of any regulatory system other than that imposing the fee itself. That is, the fee is justified as necessary to defray the cost of collecting the fee and issuing a permit after the fee is paid.

The ordinance is constitutionally infirm not only because it is not tied to the peddler's ability to pay – and thus serves to prevent at least some individuals, such as

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[2] A plaintiff whose first amendment rights are not violated by a particular provision may nonetheless challenge the law on overbreadth grounds "by showing that it substantially abridges the first amendment rights of other parties not before the court." *Village of Schaumburg v. Citizens For A Better Environment,* 444 U.S. 620, 634, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980).

the Coalition and Richard Clements – from distributing their messages, but also because it is a prior restraint on speech. This prior restraint is not constitutionally permissible as a fee tied to defraying the expenses of administering a valid regulatory scheme, because the only regulation whose expenses it defrays is that requiring payment of the fee.

Therefore, there are no issues of material fact in dispute and the plaintiffs are entitled to judgment in their favor as a matter of law on count one of their complaint.

B. Article I, § 11 of the Ohio constitution provides in pertinent part: "no law shall be passed to restrain or abridge the liberty of speech, or of the press." "[T]he free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment, and . . . the First Amendment is the proper basis for interpretation of Section 11, Article I of the Ohio Constitution." *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St.3d 221, 626 N.E.2d 59, 61 (1994). Thus, the foregoing analysis with respect to the first amendment is applicable with respect to the Ohio constitutional claim as well. *See, e.g., City of Bowling Green v. Lodico*, 11 Ohio St.2d 135, 228 N.E.2d 325 (1967) (invalidating, under federal and Ohio constitutions, ordinance requiring solicitor to obtain license for a fee before selling magazine on sidewalks, both because city official possessed unfettered discretion in issuing license and because imposition of fee constituted impermissible prior restraint).

Consequently, for the reasons discussed in section III.A. above, there are no disputed issues of material fact

and the plaintiffs are entitled to judgment as a matter of law on count two of their complaint.

IV.

This Court finds that no material facts remain in dispute and that the plaintiffs are entitled to judgment as a matter of law on both counts of their complaint. Accordingly, the plaintiffs' motion for summary judgment is granted and the defendant's motion for summary judgment is denied. This Court enters judgment in favor of the plaintiffs, declares that Cleveland Codified Ordinances § 675.02(c)(3) violates both the first amendment to the United States constitution and Article I, section 11 of the Ohio constitution, and permanently enjoins its enforcement.

Within ten days of the date of this order, the plaintiffs shall submit any motion for attorneys' fees, including all materials in support of such a motion. The city may respond within ten days of the plaintiffs' filing.

IT IS SO ORDERED.

Nos. 95-3665/4016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORTHEAST OHIO COALITION FOR THE HOMELESS, ET AL., Plaintiffs-Appellees,	)	ORDER
v.	)	(Filed Apr. 10, 1997)
CITY OF CLEVELAND, Defendant-Appellant.	)	

BEFORE: NORRIS, SUHRHEINRICH, and BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

CODIFIED ORDINANCES OF CLEVELAND, OHIO

Chapter 675

PEDDLERS AND PRODUCE DEALERS

675.01 Definitions; Chapter Scope

675.02 Peddler's License Required; Application

675.03 Peddler's License: Issuance and Replacement

675.04 Permits Required

675.05 Permit; Peddling on Private Property

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675.07 Permit; Temporary Sidewalk Occupancy Outside the Central Business District

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675.09 Regulations Governing Peddlers

675.10 Revocation or Suspension of License or Permit; Appeals

675.11 to 675.14 Reserved

675.99 Penalty

675.01 Definitions; Chapter Scope

(a) For purposes of this chapter:

(1) "Commissioner" means the Commissioner of Assessments and Licenses.

(2) "Peddling" means selling, bartering, or offering or exposing for sale or barter any goods, wares, merchandise, menial tasks, such as painting numbers on curbs, food or beverages from, in, upon, along, or through the

highways, streets, or sidewalks of the City, or in the open air or from a temporary shelter or vending device upon private property in the City.

(3) "Peddler" means any person who engages in peddling. "Peddler" includes "hawker," "huckster," and "solicitor," but does not include itinerant vendors or itinerant wholesale produce dealers licensed pursuant to Chapter 682.

(4) "Person" means an individual, corporation, partnership or association; provided however, that for purposes of Section 675.02, "person" shall mean a natural person only.

(5) "Potentially hazardous food" means any food that consists in whole or in part of milk or milk products, eggs, meat, poultry, fish, shellfish, edible crustacea, or other ingredients, including synthetic ingredients, in a form capable of supporting rapid and progressive microorganisims [sic]. The term does not include clean, whole, uncracked, odor-free shell eggs or foods which have a pH level of 4.6 or below or a water activity (aw) value of 0.85 or less.

(6) "Sidewalk" means that portion of the street between the curb lines or the lateral lines of a roadway and the adjacent property line.

(7) "Street" means street, alley, highway, roadway or avenue, including all curbs along such streets.

(8) "Vending device" means a container for the sale, display or transport of goods, wares, merchandise, equipment used for menial tasks, food or beverages by a peddler, which container has wheels and is capable of being moved by one person by muscular power.

(b) Scope of Chapter. The provisions of this chapter shall not apply to sales made to dealers by commercial travelers or selling agents in the usual course of business, to bona fide sales of goods, wares, or merchandise by samples for future delivery, to sales at trade shows or conventions, or to sales by charitable organizations in conjunction with solicitations for charity.

(c) Nothing in this chapter shall be construed to prohibit the distribution of non-commercial handbills, cards, leaflets, or other literature upon the sidewalks of the City. (Ord. No. 532-93. Passed 6-14-93, eff. 6-23-93)

675.02 Peddler's License Required; Application

(a) No person shall engage in peddling anywhere in the City without a peddler's license issued pursuant to Section 675.03. The issuance of a peddler's license to a person shall not be deemed to authorize the agents or employees of such person to peddle without a license.

(b) The application for the license required by division (a) of this section shall be made to the Commissioner upon forms to be prescribed by the Commissioner. The application shall include the following information:

(1) the name and address of the applicant;

(2) a detailed description of the goods, wares, merchandise, food, or beverages which the applicant intends to sell; and

(3) such other information as the Commissioner deems necessary to ensure compliance with this chapter.

(c) In addition to the application required by division (a) of this section, each applicant for a peddler's license shall furnish the following:

(1) two (2) photographs of the applicant taken within thirty (30) days prior to the date of application and of a size designated by the Commissioner;

(2) if the applicant will be peddling food or beverages, a copy of the applicant's food service license; and

(3) an annual license fee of fifty dollars ($50.00) which shall cover the period commencing August 1 and ending July 31 of the following year. (Ord. No. 1428-92. Passed 7-22-92, eff. 7-24-92)

675.03 Peddler's License: Issuance and Replacement

(a) Upon receipt of a completed application and all other materials required by Section 675.02, and in the case of an applicant who intends to peddle food or beverages, upon receipt of confirmation by the Director of Public Health that the applicant is free of communicable disease, the Commissioner shall issue to the applicant a peddler's license and a laminated identification card containing the applicant's photograph. The identification card shall be worn by and the license shall be kept upon the person of

the peddler at all times during which the peddler is engaged in peddling.

(b) The license issued pursuant to division (a) of this section shall contain the following information:

(1) the peddler's name and address;

(2) a detailed description of the goods, wares, merchandise, food, or beverages which the peddler is authorized to sell;

(3) the license number and the license expiration date.

(c) In the event that a licensed peddler loses the laminated identification card issued pursuant to division (a) of this section, the Commissioner shall issue a replacement identification card upon payment by the peddler of a fee of ten dollars ($10.00). (Ord. No. 1428-92. Passed 7-22-92, eff. 7-24-92)

675.04 Permits Required

(a) No person shall engage in peddling upon or from private property anywhere in the City without a permit issued in accordance with Section 675.05.

(b) No person shall engage in peddling on the highways, streets or sidewalks within the Central Business District without a permit issued in accordance with Chapter 508 or without a permit issued in accordance with Section 675.06.

(c) No person shall engage in peddling while moving continuously from place to place on the highways,

streets or sidewalks of the Central Business District without a permit issued in accordance with Section 675.06.

(d) No person shall engage in peddling upon or from a fixed location on a sidewalk outside of the Central Business District without a permit issued in accordance with Section 675.07.

(e) No person shall engage in peddling while moving continuously from place to place on the highways, streets, or sidewalks outside of the Central Business District without a permit issued in accordance with Section 675.08. (Ord. No. 1670-92. Passed 8-19-92, eff. 8-27-92)

Note: Section 675.04 was enacted by Ord. No. 1428-92, passed 7-22-92, eff. 7-24-92.

675.05 Permit; Peddling on Private Property

(a) The application for the permit required by division (a) of Section 675.04 shall be made to the Commissioner upon forms to be prescribed by the Commissioner. The application shall contain the following:

(1) the peddler's name, address and peddler's license number;

(2) the name and address of the owner of the private property upon which the peddler intends to peddle;

(3) if the peddler is the owner of said private property, documentation of the peddler's ownership, and if the peddler is not the owner of said private property, documentation, signed by the property owner, of the peddler's right to peddle upon such property;

(4) the address of the private property upon which the peddler intends to peddle; and

(5) a description of the vending device, truck, or temporary structure, if any, from which the applicant intends to peddle, including its size.

(b) Upon receipt of a permit application, the Commissioner shall notify the Council member in whose ward the proposed permit location lies that said application has been received.

(c) If the private property upon which the peddler intends to peddle is a parking lot subject to the licensing regulations of Chapter 457, the permit shall provide that peddling is limited in duration to a maximum period of five (5) consecutive days on no more than two (2) occasions per calendar year for each parking lot for which a permit is applied. Furthermore, the permit shall provide that peddling is permitted only in conjunction with a carnival, festival or other special event authorized by the City. Any permit issued prior to the effective date of this division (c) but not in conformance with the requirements of this division (c) shall be revoked thirty (30) days after the effective date of this division (c).

(d) The Commissioner shall refer all permit applications to the Commissioner of Building and Housing for review and approval. The Commissioner of Building and Housing shall not approve any such application unless he or she finds that no provisions of the City's Building Code or Zoning Code will be violated by issuance of the permit, including without limitation, the following:

(1) set back requirements;

(2) use restrictions;

(3) if the peddler intends to operate from a "structure" within the meaning of the Building Code, those provisions of the Building Code applicable to "structures"; and

(4) if the peddler intends to operate from private property that is a parking lot, those portions of the Zoning Code that require that a specified number of parking spaces be available for the use of particular business.

(e) Upon receipt of a completed application which has been approved by the Commissioner of Building and Housing and a permit fee of twenty dollars ($20.00), the Commissioner of Assessments and Licenses shall issue a permit which shall cover the period commencing August 1 and ending July 31 of the following year.

(f) The permit shall be kept upon the vending device, truck, or structure at all times during which the peddler is engaged in peddling, and shall contain the following information:

(1) the peddler's name and address:

(2) the address of the private property upon which the peddler is authorized to peddle;

(3) the name and address of the owner of such private property:

(4) a description of the vending device, truck, or temporary structure, if any, from which peddling is authorized including its size; and

(5) the permit number and permit expiration date. (Ord. No. 1427-A-92. Passed 6-14-93, eff. 6-23-93)

675.06 Permit: Zones Within the Central Business District

(a) In addition to the temporary sidewalk occupancy permits issued pursuant to Chapter 508, the Director of Public Service is hereby authorized to issue permits to peddle in zones in the Central Business District established by the Director in which the holders of such permits may peddle on such days, at such times of day and under such conditions as the Director shall determine. The zones shall be created by regulation taking into account the following factors:

(1) pedestrian and vehicular traffic patterns, including possible congestion during special events and sporting events;

(2) proximity to special events and sporting events occurring in the Central Business District and at the lakefront;

(3) proximity to retail establishments; and

(4) such other factors deemed relevant by the Director of Public Service.

No food or beverage, except as authorized in the rules and regulations promulgated pursuant to division (e) of this section, may be peddled by a person holding a permit issued in accordance with this division (a).

(b) The application for the permit authorized by division (a) of this section shall be made to the Director of Public Service upon forms to be prescribed by said Director. The application shall contain the following:

(1) the peddler's name, address, and peddler's license number;

(2) a description of the vending device, truck, or temporary structure, if any, from which the applicant intends to peddle, including its size;

(3) the zone or zones for which a permit is sought; and

(4) a description of the items to be peddled.

(c) Upon receipt of a completed application and an annual permit fee of one hundred dollars ($100.00) per zone or a daily permit fee of twenty dollars ($20.00), the Director of Public Service shall issue the appropriate permit. An annual permit shall cover the period commencing August 1 and ending July 31 of the following year.

(d) The permit shall be kept upon the vending device, truck, or structure at all times during which the peddler is engaged in peddling and shall contain the following information:

(1) the peddler's name and address;

(2) a statement of the zone or zones in the Central Business District to which the peddler is restricted;

(3) a description of the vending device, truck, or temporary structure, if any, from which peddling is authorized, including its size; and

(4) the permit number and permit expiration date.

(e) The Director of Public Service may issue rules and regulations to carry out the purposes of this section. (Ord. No. 1670-92. Passed 8-19-92, eff. 8-27-92)

Note: Section 675.06 was enacted by Ord. No. 1428-92, passed 7-22-92, eff. 7-24-92.

675.07 Permit; Temporary Sidewalk Occupancy Outside the Central Business District

(a) The application for the permit required by division (d) of Section 675.04 shall be made to the Director of Public Service upon forms to be prescribed by said director. Upon receipt of a permit application, the Director of Public Service shall notify the Council member in whose ward the proposed permit location lies that said application has been received. The application shall contain the following:

(1) the peddler's name, address, and peddler's license number;

(2) a sketch and narrative indicating the location for which permit application is being made, with sufficient detail to enable the Director of Public Service to verify the placement of the temporary vending device in accordance with the criteria contained in Section 675.09;

(3) a description of the vending device, truck, or temporary structure, if any, from which the applicant intends to peddle, including its size; and

(4) a copy of an ordinance of Council specifying the location described in division (a) (2) of this section and authorizing the peddler to peddle there from.

(b) Upon receipt of a completed application and a permit fee of twenty dollars ($20.00), the Director of Public Service shall issue a permit which shall cover the period commencing August 1 and ending July 31 of the following year.

(c) The permit shall be kept upon the vending device, truck, or structure at all times during which the peddler is engaged in peddling, and shall contain the following information:

(1) the peddler's name and address;

(2) the address or description of the location upon which the peddler intends to peddle;

(3) the number and passage date of the ordinance described in division (a) (4) of this section;

(4) a description of the vending device, truck, or temporary structure, if any, from which peddling is authorized including its size; and

(5) the permit number and permit expiration date. (Ord. No. 1814-92. Passed 2-22-93, eff. 3-4-93)

675.08 Permit: Mobile Peddling Outside the Central Business District

(a) The application for the permit required by division (e) of Section 675.04 shall be made to the Director of Public Service upon forms to be prescribed by said director. Upon receipt of a permit application, the Director of Public Service shall notify the Council member or members in whose ward or wards the peddler intends to

peddle that said application has been received. The application shall contain the following:

(1) the peddler's name, address, and peddler's license number;

(2) a statement that the peddler intends to move continuously from place to place upon those highways, streets, or sidewalks that are located outside of the Central Business District. The statement shall specify the ward or wards in which the peddler intends to peddle;

(3) a copy of the ordinance of Council specifying the ward or wards in which the peddler is authorized to peddle; and

(4) a description of the vending device, truck, or temporary structure, if any, from which the applicant intends to peddle, including its size.

(b) Upon receipt of a completed application and a permit fee of twenty dollars ($20.00), the Director of Public Service shall issue a permit which shall cover the period commencing August 1 and ending July 31 of the following year.

(c) The permit shall be kept upon the vending device, truck, or structure at all times during which the peddler is engaged in peddling and shall contain the following information:

(1) the peddler's name and address;

(2) the ward or wards in which the peddler is authorized to peddle;

(3) the number and passage date of the ordinance described in division (a) (3) of this section;

(4) a description of the vending device, truck, or temporary structure, if any, from which peddling is authorized including its size; and

(5) the permit number and permit expiration date. (Ord. No. 1428-92. Passed 7-22-92, eff. 7-24-92)

675.09 Regulations Governing Peddlers

(a) For purposes of this section:

(1) "Merchandise" means goods, wares, merchandise, food, or beverages.

(2) "Street" means street, alley, highway, roadway, or avenue.

(b) No peddler shall sell or display merchandise:

(1) to the occupants of vehicles stopped in traffic;

(2) from any vehicle, structure, or device that is situated in any portion of a street which is designed or ordinarily used for vehicular travel; or

(3) at a location or in a manner that hinders or restricts access to a telephone booth, mail box, parking meter, police or fire call box, traffic control box, fire hydrant, or sidewalk elevator, or that blocks, obstructs, or restricts the free passage of pedestrians or vehicles in the lawful use of the sidewalks or streets.

(c) Unless the Director of Public Service makes a determination to the contrary, which determination is reflected in the location specified on a permit issued in accordance with this chapter, no peddler shall sell or display merchandise:

(1) at any location where the sidewalk is less than ten (10) feet in width;

(2) within ten (10) feet of a crosswalk;

(3) within that portion of a sidewalk bounded by the prolongation of each intersecting abutting property line to the respective curblines or within ten (10) feet thereof;

(4) within ten (10) feet of any doorway or the prolongation of any doorway width to the curbline; or

(5) within twenty (20) feet of another permitted location, provided however, that the distance between locations permitted pursuant to Section 675.06 shall be in accordance with the rules and regulations promulgated by the Director of Public Service pursuant to division (e) of Section 675.06.

(d) No peddler shall display merchandise or place lines or other devices for the display of merchandise on any building or on any utility pole, planter, tree, trash container, or other sidewalk fixture.

(e) A peddler who has received a permit to peddle upon private property shall not encroach into any street or sidewalk in any way.

(f) No peddler shall place any merchandise in or upon any street or sidewalk, and all peddlers shall exercise reasonable care to ensure that their merchandise, packaging, display equipment or other paraphernalia does not create a health or safety hazard to customers, other users of the sidewalks and streets, or persons on abutting property.

(g) No peddler shall leave a vending device unattended at any time, leave a vending device on a sidewalk between the hours of midnight and 6:00 a.m., or conduct business on a sidewalk between those hours.

(h) A peddler who has received a permit to peddle on public property shall obey any lawful order of a police officer to remove himself and his vending device entirely from the sidewalk to avoid congestion or obstruction during an emergency.

(i) A peddler selling food from a vending device which is required by state law to have a food service operation license shall:

(1) serve only nonpotentially hazardous foods or commissary-wrapped foods maintained at proper temperatures, provided that if water systems and handwashing facilities are available, the peddler may prepare and serve frankfurters and pre-cooked sausages;

(2) operate only from a licensed commissary to which the peddler takes the vending device daily for cleaning and servicing.

(j) No peddler shall:

(1) cook food in or on a street or sidewalk;

(2) conduct business without making available a container suitable for the placement of litter; or

(3) throw or deposit any merchandise, packaging, containers, fat, grease, paper or other litter on any streets or sidewalk or in any sewer.

(k) A peddler who is required to move continuously from place to place shall locate any vending device,

equipment and merchandise adjacent and parallel to a curb when stopped for a sale.

(l) No peddler shall make any loud or unreasonable noise for the purpose of advertising or drawing attention to merchandise or for any other purpose.

(m) All peddlers shall comply with all requirements of state and local law applicable to them, including without limitation the City's Fire Code. (Ord. No. 1670-92. Passed 8-19-92, eff. 8-27-92)

Note: Section 675.09 was enacted by Ord. No. 1428-92, passed 7-22-92, eff. 7-24-92

675.10 Revocation or Suspension of License or Permit; Appeals

(a) The Commissioner may at any time revoke or suspend any license or permit granted by the Commissioner under the authority of this chapter for failure to comply with the terms of this chapter or with any law, rule or regulation relating to peddlers or the conduct of their business.

(b) The Director of Public Service may at any time revoke or suspend any permit granted by said director under the authority of this chapter for failure to comply with the terms of this chapter or with any law, rule or regulation relating to peddlers or encroachments in the rights-of-way of the City.

(c) In case of the refusal to issue a license or permit or the revocation or suspension of a license or permit by the Commissioner or by the Director of Public Service, the applicant or licensee may appeal the Commissioner's

or Director's action to the Board of Zoning Appeals, established pursuant to Charter Section 76-6. Notice of such appeal shall be in writing and shall be filed with the Board within ten (10) days from the date of the Commissioner's or Director's action. Within ten (10) days after the filing of such notice, the Board shall proceed to hear such appeal, at which hearing all parties interested shall be afforded an opportunity to be heard. The Board shall render a decision within ten (10) days of the conclusion of the hearing. The Board may sustain, disapprove or modify the Commissioner's or Director's action, and the Board's decision shall be final. (Ord. No. 1670-92. Passed 8-19-92, eff. 8-27-92)

Note: Section 675.10 was enacted by Ord. No. 1428-92, passed 7-22-92, eff. 7-24-92.

675.11 to 675.14 Reserved

Note: Former Sections 675.11 through 675.14 were repealed by Ord. No. 1428-92, passed 7-22-92, eff. 7-24-92.

675.99. Penalty

(a) Whoever violates any of the provisions of this chapter is guilty of improper peddling, a minor misdemeanor, and shall be fined one hundred dollars ($100.00). The fine set forth herein is mandatory and shall not be suspended by the court in whole or in part. Each day upon which a violation occurs or continues shall constitute a separate offense and shall be punishable as such hereunder.

(b) In addition to any other method of enforcement provided for in this chapter, the provisions of division (a) of this section may be enforced by the issuance of a citation in compliance with Rule 4.1 of the Ohio Rules of Criminal Procedure.

(c) If the offender persists in improper peddling after reasonable warning or request to desist, improper peddling is a misdemeanor of the first degree. (Ord. No. 137-A-91. Passed 6-17-91, eff. 6-26-91)

(2)

Supreme Court, U. S.
FILED
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No. 97-75

In The

Supreme Court of the United States

October Term, 1996

NORTHEAST OHIO COALITION FOR THE HOMELESS, RICHARD CLEMENTS, FRUIT OF THE ISLAM OF MUHAMMAD'S MOSQUE NO. 18, AND STEVEN D. HILL,

Petitioners,

vs.

CITY OF CLEVELAND,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SHARON SOBOL JORDAN
Director of Law

*CHARLES E. HANNAN, JR.
Assistant Director of Law

Room 106 – City Hall
601 Lakeside Avenue
Cleveland, OH 44114
(216) 664-2800

Attorneys for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

QUESTION PRESENTED FOR REVIEW

1. Whether an annual $50.00 registration fee that defrays a city's administrative costs in regulating the conduct of peddling on city streets and sidewalks impermissibly burdens First Amendment rights?

LIST OF PARTIES

Petitioners:

Northeast Ohio Coalition for the Homeless

Richard Clements

Fruit of Islam of Muhammad's Mosque No. 18

Steven D. Hill

Respondent:

City of Cleveland

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STATEMENT OF JURISDICTION

Petitioners Northeast Ohio Coalition for the Homeless, Richard Clements, Fruit of Islam of Muhammad's Mosque No. 18, and Steven D. Hill (hereafter collectively referred to as "petitioners") brought this action in the United States District Court for the Northern District of Ohio, Eastern Division, on September 27, 1994, to challenge the constitutionality of an ordinance of the respondent City of Cleveland (hereafter "respondent") that required all peddlers to pay an annual registration fee of fifty dollars ($50.00). On May 3, 1995, the district court ruled that the ordinance violated the First Amendment and permanently enjoined its enforcement. *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 885 F.Supp. 1029 (N.D.Ohio 1995).

On February 3, 1997, the United States Court of Appeals for the Sixth Circuit reversed the district court and upheld the constitutionality of Cleveland's ordinance. *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107 (6th Cir. 1997).

On April 10, 1997, the court of appeals denied the petitioners' petition for rehearing and suggestion for rehearing en banc.

Petitioners have invoked this Court's jurisdiction to seek a writ of certiorari under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Downtown Cleveland city sidewalks are a popular magnet for peddlers and street vendors who peddle

countless varieties of merchandise, food products, and other such items.[1] Cleveland regulates the business of peddling by a license registration system under Chapter 675 of Cleveland's codified ordinances. This registration process enables the local authorities to have some ability to account for the many individuals who conduct their commerce on city streets and sidewalks.[2]

To obtain a peddler's license, an applicant must provide the applicant's name and address, a detailed description of the goods, wares, merchandise, food, or beverages which the applicant intends to sell, two (2) recent photographs, and a copy of the applicant's food service license, if applicable. In return for payment of an annual registration fee of $50.00 that defrays expenses

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[1] Cleveland's ordinance defines "peddling" to include "selling, bartering, or offering or exposing for sale or barter any goods, wares, merchandise, menial tasks, such as painting numbers on curbs, food or beverages from, in, upon, along, or through the highways, streets, or sidewalks of the City, or in the open air or from a temporary shelter or vending device upon private property in the City." § 675.01(a)(2), Cleveland Codified Ordinances.

[2] The petitioners wrongly mischaracterize Cleveland's ordinance when they insist that this case is "about the power of municipalities to erect steep cost barriers to the sidewalk distribution of political and religious 'street' newspapers." (Petition at p. 3) In truth, Cleveland's ordinance does not even purport to be a regulation of speech. It is a regulation of the business of peddling and was drawn into issue only as a consequence of the petitioners' determination to engage in conduct, namely peddling, that Cleveland has a legitimate and indeed unchallenged interest in regulating. And as will be discussed within the argument, the ordinance imposes no impermissible burden on First Amendment rights.

incurred by respondent in processing the application and supervising the licensee, the applicant receives a peddler's license and a laminated identification card with photograph to be kept by the applicant while peddling.

The evidence presented below showed that the $50.00 registration fee authorized by § 675.02(c)(3) of Cleveland's codified ordinances served to defray the administrative expenses associated with processing the application.[3]

The petitioners do not dispute that the conduct in which they are engaged constitutes "peddling" within the meaning of Cleveland's ordinances. Nevertheless, they contend that it is unconstitutional to require them to pay the registration fee.

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[3] A city official identified the particular components of administrative costs associated with such licenses. They included the application process, supervisory costs, license issuance, miscellaneous paper costs, and annual field maintenance. A calculation of such costs done in 1989, which was the most current information available, reflected that those costs accounted for $43.00. The official added that while the City's administrative costs had increased since 1989, the registration fee established to defray those administrative expenses had not increased since the peddler registration fee was set at $50.00 by ordinance on July 24, 1992.

While the petitioners never challenged Cleveland's administrative costs, they cling to the district court's dismissive observation that Cleveland offered no further explanation for its costs. (Petition at 6) In fact, Cleveland offered a full explanation for the various components of its administrative costs, but the district court chose to ignore that explanation and the petitioners appear content to stand on that misstatement.

Petitioner Northeast Ohio Coalition for the Homeless (NEOCH) identified itself as a non-profit advocacy group that publishes *The Homeless Grapevine*. NEOCH sells its newspapers to homeless individuals for ten cents per newspaper, and the individual peddlers in turn offer the newspaper to passers-by for a suggested donation of one dollar, retaining all proceeds received for themselves. Petitioner Richard Clements was identified as a homeless individual who had previously been ticketed for peddling without a license, although those charges were later dropped.

Petitioner Fruit of Islam of Muhammad's Mosque No. 18 identified itself as a non-profit organization whose members sell *The Final Call* for one dollar per newspaper. Members keep thirty cents per newspaper and must remit the remainder to their mosque. They must also donate an additional $50.00 per month to their mosque. Petitioner Steven D. Hill was identified as a *Final Call* vendor who had been ticketed and prosecuted for peddling without a license.

Petitioners challenged only the $50.00 peddler registration fee required by § 675.02(c)(3) of the Codified Ordinances of the City of Cleveland. They claimed that because they were engaged in expression protected by the First Amendment, Cleveland's peddler registration fee represented a "flat tax" on expression in violation of the First Amendment. Petitioners further claimed that they were unable to afford the $50.00 peddler registration fee.[4]

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[4] While petitioners and the district court say that this fact was not disputed by respondent, the truth is that the parties

On cross-motions for summary judgment, the district court declared that Cleveland's ordinance violated the First Amendment and permanently enjoined its enforcement. *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 885 F.Supp. 1029 (N.D.Ohio 1995).

The court of appeals reversed the lower court and upheld the constitutionality of Cleveland's ordinance. *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107 (6th Cir. 1997).

ARGUMENT

REASONS FOR DENYING THE WRIT

For reasons that will be discussed in greater detail within the body of the argument, the petition should be denied because the court of appeals correctly applied established precedent to the facts of this case and its analysis is fully consistent with this Court's precedents.

But review should also be denied because nothing about the circumstances of this case merits further review by the Court.

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filed cross-motions for summary judgment with each contending that the facts material to their respective argument entitled that party to judgment as a matter of law. Because the petitioners' alleged inability to pay the $50.00 peddler registration fee was not legally material to determining whether Cleveland's ordinance violated the First Amendment, it was not contested and its truth was assumed solely for purposes of summary judgment motion practice. It is inaccurate, however, to suggest that this fact was conceded.

In particular, the petitioners falsely suggest that they have been "targeted for suppression." Petition at 8. In fact, neither they nor anyone else has been "targeted for suppression." Indeed, Cleveland's peddler registration fee is not a regulation of speech at all but at worst is a content-neutral business practice regulation. The petitioners' misguided attempt to portray themselves as "targets" does not make an otherwise unremarkable case any more significant.

And despite the petitioners' assertion that the appellate court's decision poses a grave threat to the distribution of "street newspapers," the petitioners make no showing of any meaningful conflict among the courts in addressing the issues presented by this case. Given the petitioners' insistence that the distribution of such newspapers "is a growing phenomenon in American cities," see Petition at 3, n.1, it is curious that the petitioners cannot cite a single decision holding that a peddler fee that served to defray the government's administrative expenses was nevertheless unconstitutional in violation of the First Amendment.[5]

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[5] The petition makes passing reference to a number of lower court decisions that supposedly support the petitioners' contention, see Petition at 7, nn. 7-11, but those cases are readily distinguishable from this case. Some of those cases involved constitutionally infirm licensing laws that vested unfettered discretion in government officials, a claim petitioners do not assert here. See, e.g., *Hull v. Petrillo*, 439 F.2d 1184 (2nd Cir. 1971); *Gall v. Lawler*, 322 F.Supp. 1223 (E.D. Wis. 1971); *City of Bowling Green v. Lodico*, 11 Ohio St.2d 135, 228 N.E.2d 325 (1967). Others were decided on grounds wholly unrelated to the constitutional validity of a particular peddling fee. See, e.g., *Zimmerman v. Village of London, Ohio*, 38 F.Supp. 582 (S.D. Ohio

While the petitioners would wrongly attempt to shift the burden to respondent or the lower court to cite decisions directly on point, the reality is that there appear to be no other cases directly on point. Consequently, the lower court properly applied settled legal principles to these facts. Nothing in the petition provides any basis to find that the Sixth Circuit's reasoned disposition of this case merits further review by this Court.

The petition should be denied.

I. CLEVELAND'S PEDDLER REGISTRATION FEE DOES NOT VIOLATE THE FIRST AMENDMENT.

Cleveland's peddler registration fee serves to defray the city's administrative expenses in regulating the business of peddling on city streets and sidewalks. This legitimate regulation of conduct does not become constitutionally offensive simply because the petitioners claim that their financial solicitations enjoy a measure of protection under the First Amendment. It likewise does

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1941)(invalidating ordinance as applied to distributor of material on private property); *City of Cincinnati v. Mosier*, 61 Ohio App. 81, 22 N.E.2d 418 (1939) (construing ordinance so as not to apply to peddler's conduct).

The only cases which purport to address peddling fees either did not address whether such fees are permissible to defray administrative expenses or did not present an adequate record to relate the challenged fee to the government's administrative expenses. See, e.g., *Hull v. Petrillo, supra; Gall v. Lawler, supra.* See also, *Holy Spirit Assn. for the Unification of World Christianity v. Hodge*, 582 F.Supp. 592 (N.D. Texas 1984).

None of these decisions cast any doubt on the sound analysis rendered by the Sixth Circuit on the facts of this case.

not become offensive if the petitioners claim to be unable to afford the fee or simply choose not to pay it. Because Cleveland's ordinance is a content-neutral regulation that is narrowly tailored to serve a significant governmental interest that leaves open ample alternative channels of communication, the registration fee does not violate the First Amendment.

While petitioners insist that Cleveland's registration fee operates "as a precondition to exercising the First Amendment right to disseminate ideas on public sidewalks," Petition at 11, they seriously misconstrue Cleveland's ordinance.

First, it is readily apparent that the ordinance does not purport to be a regulation of speech at all but is simply a regulation of the business of peddling or soliciting. To the extent the ordinance has an incidental effect on speech because of the matters the petitioners choose to peddle, the ordinance is plainly content-neutral.[6]

And while solicitations for money may involve speech interests that are entitled to a measure of protection under the First Amendment, see *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 788-789 (1988); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980), it is also true that the conduct associated with solicitations implicates significant governmental interests that permit a greater measure

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[6] It should be noted that a peddler's license is issued upon completion of the application and payment of the fee. Petitioners do not contend that issuance is subject to improper governmental discretion.

of regulation than might otherwise be allowed for the mere dissemination of ideas without the concurrent appeal for donations.[7]

In *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), the Court upheld a regulation that prohibited solicitations in the interior of an airport terminal. Summarizing the disruptive elements of conduct that justified an outright ban on solicitation, the Court observed:

> We have on many prior occasions noted the disruptive effect that solicitation may have on business. Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. Passengers who wish to avoid the solicitor may have to alter their path, slowing both themselves and those around them. The result is that the normal flow of traffic is impeded. . . .
>
> In addition, face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering

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[7] This case does not involve the question of whether speech receives less protection under the First Amendment if it has a commercial dimension to it. But irrespective of the measure of protection afforded such speech, the conduct associated with the commercial element does impact on the significant government interest in regulating such conduct.

> physical impairment and who cannot easily avoid the solicitation. The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to short-change those who agree to purchase. Compounding this problem is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly.

Id., 505 U.S. at 683-684 (citations and internal quotation marks omitted). See also *id.* at 698 (O'Connor, J., concurring) ("As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information.")(quoting *United States v. Kokinda*, 497 U.S. 720, 734 (1990)); *id.* at 703-707 (Kennedy, J., concurring) (agreeing that ban on solicitations for immediate payment of money was narrowly tailored to serve significant government interest of preventing fraud and duress associated with such conduct).

In the instant case, Cleveland's peddler registration program regulates the conduct of peddling and other such solicitations. It does not go so far as to ban these practices but instead merely requires such persons to register and pay the same fee any other peddler must pay to defray the administrative costs incurred to maintain the program. It places no restriction on leafletting or any

other manner of disseminating ideas unaccompanied by sales or solicitations. So to the extent that the petitioners wrongly contend that Cleveland's ordinance operates as a precondition to the dissemination of ideas, they misstate the purpose and effect of the ordinance.

But even if Cleveland's peddler registration fee were understood to be a content-neutral regulation of speech, the fee does not violate the First Amendment and was properly upheld because it serves to defray the expenses incurred by Cleveland in administering a valid regulatory scheme and the appellate court's analysis below is fully consistent with this Court's precedents.

In *Cox v. New Hampshire*, 312 U.S. 569 (1941), the Court upheld a license fee imposed in connection with the granting of a permit for parades or processions on public streets. Daily fees of as much as $50.00 were required to be paid in advance. *Cox*, 312 U.S. at 571, n. 1. Holding that the license fee was "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed," the Court concluded that "[t]here is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated." *Id.*, 312 U.S. at 577.

By contrast, the tax invalidated two years later in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), was "not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities" of solicitors, such as "the expense of protecting those on the streets and at home against the abuses of solicitors." *Murdock*, 319 U.S. at 113-114; *id.*, at 116. In marked contrast to Cleveland's peddler registration program, the *Murdock* tax was not tied to "a registration system under which those going

from house to house are required to give their names, addresses and other marks of identification to the authorities." *Murdock*, 319 U.S. at 113. Instead, the *Murdock* tax was found to be a flat tax that was unrelated to the scope of the activities of the speakers or to their realized revenues or to the expenses of administering a valid regulatory scheme, and thus was used as a condition of their right to speak. Accord *Follet v. McCormick*, 321 U.S. 573 (1944) (invalidating license tax that operated as a prior restraint on free exercise of religion).

Thus, the fee in *Cox* was upheld because it was reasonably related to defray the government's expenses in administering a valid regulatory scheme whereas the tax in *Murdock* was not reasonably related to the government's expenses in administering a valid regulatory scheme and instead represented only a revenue-generating tax on expression. In this Court's words, "[t]he tax at issue in *Murdock* was invalid because it was unrelated to any legitimate state interest, not because it was of a particular size." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 137 (1992).[8]

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[8] Petitioners' continued reliance on *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990), is mystifying. In that case, the Court expressly limited *Murdock* and *Follet* to apply "only where a flat license tax operates as a prior restraint on the free exercise of religious beliefs." *Id.*, 493 U.S. at 389. The Court ultimately upheld California's sales and use tax, contrasting it from the *Murdock* tax that was " 'in no way apportioned' to the 'realized revenues.' " *Id.*, 493 U.S. at 390 (quoting *Murdock*, 319 U.S. at 113-114). Thus, the *Jimmy Swaggart* court's distinction and indeed express limitation of *Murdock* hardly supports the petitioners' claims here.

Reviewing these precedents, the court of appeals below fairly observed:

> The lesson to be gleaned from *Cox* and *Murdock* is that an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest.

105 F.3d at 1109-1110. Because Cleveland's peddler registration fee served to defray the expenses incurred in administering a valid regulatory scheme, the court of appeals correctly upheld the fee.

For their part, the petitioners say the appellate court decision "flouts" *Murdock* and supposedly consigns it to "oblivion." In truth, the court simply found the instant case to be distinguishable from *Murdock* but indistinguishable from *Cox*.

The petitioners wrongly criticize the appellate court for relying on cases involving parades such as *Cox* and *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir.), *cert. denied*, 502 U.S. 899 (1991).

But contrary to petitioners' assertion, *Murdock* did not distinguish *Cox* on the grounds that one involved a parade and the other sidewalk solicitation. According to *Murdock*, *Cox* involved "state regulation of the streets to protect and insure the safety, comfort, or convenience of the public." *Murdock*, 319 U.S. at 116. No comparable

government interest was advanced in *Murdock*. The *Murdock* court added that unlike the fee in *Cox*, the *Murdock* tax was

> not merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community. And the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors.

Murdock, 319 U.S. at 116.

In short, the only consequential distinction between *Cox* and *Murdock* is that the fee in *Cox* was reasonably related to serve a government interest of defraying the administrative costs of a legitimate regulation whereas the tax in *Murdock* was not shown to be reasonably related to serve a government interest. See *Forsyth, supra*, 505 U.S. at 137. *Murdock* draws no constitutional distinction between the manner of expression or where it occurs. To the extent that a regulation of pure speech such as a parade does not violate the First Amendment, Cleveland's regulation of the business of peddling is seemingly even more removed from the core concerns of the First Amendment.

In this case, the court of appeals correctly found that Cleveland's peddler registration fee was narrowly tailored to serve a significant governmental interest. That court noted:

> [T]he city has an interest in giving its citizens some assurance that it can identify and pursue peddlers who do engage in fraudulent or

> unlawful conduct. This ordinance, by requiring street peddlers to register with the city and wear identification cards while they are engaged in peddling, furthers the aforementioned interests, and the administrative costs incident to the implementation of an ordinance embodying compelling governmental interests are defrayed by the fee.
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> * * *
>
> Like the regulations upheld in *Cox* and *Stonewall*, Cleveland's peddlers' ordinance and the license fee it imposes are narrowly tailored to further a legitimate governmental interest. The fee is reasonably related to the costs of administering the ordinance, and the licensing program helps to prevent fraud by solicitors. In addition, the program enables the city to offer some protection to individuals who donate money to street peddlers. Moreover, unlike the fee in *Forsyth County*, the fifty dollar license fee in this case is content-neutral – all peddlers must pay it regardless of the source and nature of the products they peddle. Accordingly, the city's fee does not unduly or impermissibly burden [petitioners'] First Amendment rights.

105 F.3d at 1110.

Petitioners do not dispute that Cleveland's regulation is narrowly tailored to serve a government interest. They imply that there could be no fraud in the distribution of their street newspapers, see Petition at 9, n. 14, but they offer no comforting explanation why some solicitors may practice fraud or duress but others do not.

While citizen complaints about a registered peddler can at least be investigated, complaints about an unregistered peddler may be incapable of investigation. Regulating such conduct necessarily has administrative costs associated with it. Cleveland's fee is narrowly tailored to serve that interest.

Moreover, petitioners are wrong when they suggest that the sidewalks are closed to the dissemination of their ideas. While they may not engage in peddling without complying with Cleveland's legitimate regulatory scheme, they remain free to disseminate their views on sidewalks. But conduct that is the legitimate subject of regulation does not become immune from regulation simply because it occurs on a sidewalk.

The court of appeals correctly determined that Cleveland's peddler registration fee imposes no undue or impermissible burden on First Amendment rights. Accordingly, further review of that decision is not warranted and the petition should be denied.

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS.

Petitioners wrongly assert that the decision below conflicts with *Hull v. Petrillo*, 439 F.2d 1184 (2nd Cir. 1971). Petitioners' contention is wholly without merit.

In *Hull*, an ordinance gave the mayor discretion to grant licenses "to such persons as he shall deem proper." *Hull*, 439 F.2d at 1185. The Second Circuit Court of Appeals ruled that "the sweeping power granted the mayor by the terms of the ordinance to determine who is

to receive a license goes well beyond the level of discretion permitted city officials in regulating the exercise of first amendment rights." *Id.*, 439 F.2d at 1186.

In contrast, there is no claim in the instant case that city officials have such unbridled discretion.

Moreover, the alternate grounds of *Hull* on which the petitioners now rely was subsequently repudiated within the Second Circuit. In *United States Labor Party v. Codd*, 527 F.2d 118 (2nd Cir. 1975), the court upheld a provision of the New York Administrative Code which established a five-dollar fee for the issuance of a daily permit to use a sound amplification device. Following *Cox v. New Hampshire*, the court concluded that the fee defrayed the administrative costs associated with enforcement of the ordinance. The court added:

> *Hull v. Petrillo*, 439 F.2d 1184 (2nd Cir. 1971), which did not mention *Cox v. New Hampshire, supra*, sustained a complaint by the Black Panthers based on the claim that the police were *harassing* them in the sale of their newspapers. The discussion of the constitutionality of the fee required for a license which was "granted by the mayor 'to such persons as he shall deem proper,' " *id.* at 1185-86, was, in the circumstances, *obiter.*

United States Labor Party v. Codd, 527 F.2d at 120, n. 6 (emphasis in original).

In short, *Hull* is of dubious authority within its own circuit. It hardly provides a basis to find a legal conflict

with the sound reasoning employed by the Sixth Circuit Court of Appeals in this case.[9]

Because petitioners have not shown any legal conflict among the circuits on the question presented, their petition should be denied.

III. A PERMISSIBLE REGISTRATION FEE DOES NOT BECOME UNLAWFUL DUE TO AN APPLICANT'S CLAIMED INABILITY TO PAY.

The court of appeals correctly determined that a fee that serves to defray the government's administrative and regulatory expenses does not unduly or impermissibly burden First Amendment rights. Petitioners maintain that even if Cleveland's annual peddler fee does defray the city's administrative expenses, the petitioners' claimed inability to pay the annual fee causes the fee to operate as a "forum-access admission price" in violation of the First Amendment. Petition at 17. Their argument is without merit.

First, petitioners are wrong in their characterization because Cleveland's peddler registration fee is a business regulation and not a speech regulation. As such, it is not a

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[9] Petitioners' passing reference to *Bery v. New York*, 97 F.3d 689 (2nd Cir. 1996), *cert. denied*, 117 S.Ct. 2408 (1997), does not support their suggestion of a conflict among the circuits. In that case, the court struck down a city regulation under which a numerical cap of vendors licenses was selectively enforced. No such claim is made by petitioners here and that case did not address the constitutionality of a fee as is presented here. *Bery* poses no conflict with the Sixth Circuit's decision.

"forum-access" regulation but a business practice regulation.

And while the petitioners erroneously insist that their inability to pay the fee is an undisputed fact, see *supra*, at 4, n. 4, they offer no authority for the proposition that a fee like the one here that is otherwise lawful to defray the government's administrative expenses becomes constitutionally offensive for a claimed inability to pay. This inability to pay occurs not as a result of any adverse government action but rather because of an individual's religious beliefs or personal difficult circumstances. In any event, the petitioners cite no authority to support the proposition that a fee that is otherwise valid becomes invalid under these circumstances.[10]

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[10] Petitioners rely in part on cases decided before this Court stepped in to resolve a conflict concerning the constitutionality of charging a fee for a speaker in a public forum in *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992). See Petition at 21, n. 36 (citing *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986); *Invisible Empire of the Knights of the Ku Klux Klan v. City of West Haven*, 600 F.Supp. 1427 (D.Conn. 1985)). Those cases involved circumstances where the fee depended on the controversial nature of the speech and the anticipated audience response to the speech. The *Forsyth County* court held such content-based fees to be unlawful.

But the *Forsyth County* court went on to note that the size of the fee is not determinative. It pointed out that the tax in *Murdock* "was invalid because it was unrelated to any legitimate state interest, not because it was of a particular size." *Forsyth County*, 505 U.S. at 137. By the same token, the level of the fee in *Forsyth County* was irrelevant because "[a] tax based on the content of speech does not become more constitutional because it is a small tax." *Id.*, 505 U.S. at 136.

The petitioners are wrong when they insist that Cleveland's ordinance denies them access to sidewalks. Petition at 18. As noted previously, petitioners are not denied access to disseminate their views on city sidewalks. At the same time, they may not engage in the conduct of peddling without complying with Cleveland's legitimate regulatory scheme. While petitioners' noncompliance with Cleveland's registration system may prevent them from engaging in all the conduct they wish to practice, "[t]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981).

Finally, petitioners' attempt to question the precision of the amount of Cleveland's fee does not merit review. As noted *supra*, at 3, n. 3, the annual $50.00 registration fee reasonably serves to defray the various cost components Cleveland incurs to administer the program. Under these circumstances, the court of appeals correctly found that Cleveland's fee was reasonably related to the expenses incident to the administration of the ordinance and to the maintenance of public safety and order and was neither unreasonable nor excessive. See 105 F.3d at 1110.

Cleveland's regulation of the business of peddling merchandise does not impermissibly burden First Amendment rights. The court of appeals correctly found that Cleveland's peddler registration fee was narrowly tailored to serve a significant government interest of administering Cleveland's peddler program and defraying the expenses incurred in administering that program.

Because this case does not present issues warranting review by the Court, the petition should be denied.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SHARON SOBOL JORDAN
(No. 0006731)
Director of Law

*CHARLES E. HANNAN, JR.
(No. 0037153)
Assistant Director of Law

Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
664-4333

Attorneys for Respondent
City of Cleveland

**Counsel of Record*